

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/STOP PRESS: PERPETUITIES AND ACCUMULATIONS ACT 2009

PERPETUITIES AND ACCUMULATIONS (

STOP PRESS:

The Perpetuities and Accumulations Act 2009 amends the law relating to the avoidance of future interests on grounds of remoteness and the law relating to accumulations of income. The Act received royal assent on 12 November 2009 and ss 23 and 24 came into force on that day. The remaining provisions come into force on 6 April 2010: SI 2010/37.

The rule against perpetuities applies (and applies only) as provided by s 1 unless an exception to the rule applies by virtue of s 2. Power is conferred on the Lord Chancellor by s 3 to specify exceptions to the rule. Section 4 abolishes existing exceptions to the rule. Under s 5, the perpetuity period is 125 years (and no other period). Such period starts in accordance with the provision made by s 6. A wait and see rule, set out in s 7, provides for an estate or interest to be treated as if it were not subject to the rule against perpetuities until such time (if any) as it becomes established that the vesting must occur (if at all) after the end of the perpetuity period, and that, if it becomes so established, the validity of anything previously done in relation to the interest is not affected. By virtue of s 8, if it becomes apparent that an estate or interest would be void for perpetuity if the inclusion of certain persons as members of a class would cause the estate or interest to be treated as void for remoteness, those persons must be treated as excluded from the class from the time it is or becomes apparent, unless their exclusion would exhaust the class. An estate or interest is not void for remoteness by reason only that it is ulterior to and dependent on an estate or interest which is so void: s 9. If an estate arising under a right of reverter on the determination of a determinable fee simple is void for remoteness, the determinable interest becomes absolute under s 10. Section 11 defines when a power of appointment is a 'special power of appointment' for the purposes of the Act. Provision is made by s 12 for pre-commencement instruments where the perpetuity period is difficult to ascertain. Restrictions on excessive accumulations are abolished by s 13. Section 14 imposes restrictions on accumulations for charitable purposes; and s 15 prescribes the instruments to which the Act applies. The application of specified provisions of the Perpetuities and Accumulations Act 1964 are excluded in relation instruments to which the 2009 Act applies: s 16. By virtue of s 17, the Act binds the Crown but does not extend the rule against perpetuities in relation to the Crown. The rule of law limiting the duration of non-charitable purpose trusts is not affected by the Act: s 18. By virtue of s 19, if provision is made otherwise than by an instrument, the Act applies as if the provision were contained in an instrument taking effect on the making of the provision. Section 20 provides for interpretation, and s 21 and the Schedule provide for repeals. Section 22 deals with commencement, s 23 with extent and s 24 with short title.

Amendments, repeals and revocations

Subscribers should note that the list below mentions repeals and amendments which are or will be effective when the Act is fully in force. Please refer to the top of this summary for details of the in-force dates of the provisions of the Act. Please also note that the list is not exhaustive.

Specific provisions of a number of Acts are added, amended or repealed. These include: Law of Property Act 1925 ss 162, 164-166; Perpetuities and Accumulations Act 1964 ss 13, 15(5A), (5B); Pension Schemes Act 1993 s 163.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/1. INTRODUCTION/1001. Basis of the rules affecting perpetuities.

1. INTRODUCTION

1001. Basis of the rules affecting perpetuities.

The rules of law affecting perpetuities are based upon considerations of public policy¹. Although the principle of private ownership requires that an owner of property is to have power to dispose as he thinks fit, either during life or on death, of his whole interest in the property he owns, public policy requires that the power should not be abused. Accordingly, from early times, the law has discouraged dispositions of property which either impose restrictions on future alienations of that property, or fetter to an unreasonable extent its future devolution or enjoyment.

A reference in an instrument to the rule against perpetuities is construed as a reference to the true rule² unless it is plain from the instrument that something else is meant and what that something else is³. The mere fact that the instrument discloses a misapprehension on the part of the draftsman as to the true rule does not prevent the court from finding that in using the words the intention is to preserve the limitation from the perils of the true rule³.

¹ These considerations were stated in *Stanley v Leigh* (1732) 2 P Wms 686 at 688 per Jekyll MR, to be 'the mischief that would arise to the public from estates remaining for ever or for a long time inalienable or untransferable from one hand to another, being a damp to industry and prejudice to trade, to which may be added the inconvenience and distress that would be brought on families whose estates are so fettered'. See also Fearn's Contingent Remainders (10th Edn) 562 et seq, Butler's notes; Lewis's Law of Perpetuity 3; *Duke of Norfolk v Howard* (1683) 1 Vern 163 at 164, HL; *Taylor d Atkyns v Horde* (1757) 1 Burr 60 at 115, 116 per Lord Mansfield CJ; *Duke of Marlborough v Earl Godolphin* (1759) 1 Eden 404 at 416; *Re Parry and Daggs* (1885) 31 ChD 130 at 134, CA per Fry LJ; *Re Ashforth, Sibley v Ashforth* [1905] 1 Ch 535 at 542 per Farwell J; *Re Earl of Stamford and Warrington, Payne v Grey* [1912] 1 Ch 343 at 367, CA; *Re Leek, Baron Darwen v Leek* [1969] 1 Ch 563 at 585, [1968] 1 All ER 793 at 800, 801, CA; Gray's Rule against Perpetuities (4th Edn) s 268; Morris and Leach's Rule against Perpetuities (2nd Edn) 26-29.

² For the rule against perpetuities see PARA 1008 post.

³ *IRC v Williams* [1969] 3 All ER 614 at 619, 620, [1969] 1 WLR 1197 at 1203 per Megarry J. Cf *Re Abrahams' Will Trusts, Caplan v Abrahams* [1969] 1 Ch 463 at 477, [1967] 2 All ER 1175 at 1185, 1186, where Cross J refused to construe the words as a reference to the true rule. See also PARA 1024 post.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/1. INTRODUCTION/1002. The three main rules.

1002. The three main rules.

The law which regulates dispositions fettering the future alienation, devolution or enjoyment of property falls under three main heads. The first is the rule which invalidates limitations and trusts that impose restrictions upon the future alienation of property, which extend beyond the period permitted by the rule next mentioned¹. An example of such a limitation or trust is a gift

of land to be retained and used for ever as a burial ground². This first rule, prohibiting trusts of perpetual duration, is not the subject of this title and is dealt with elsewhere³.

The second main rule is that directed against remoteness of vesting, generally known as the rule against perpetuities⁴, and is to the effect that every limitation of property, unless it depends upon an estate tail, to be valid must necessarily vest, if at all, within the period permitted by the rule⁵.

The third main rule is that which prohibits the accumulation of income for longer than one or other of the periods prescribed by statute⁶ and is discussed subsequently⁷. This rule is, however, excluded where an absolute vested gift is payable at a future date with a direction to accumulate the intermediate income and pay it with the principal and the beneficiary can put a stop to the accumulation⁸, whether the beneficiary is an individual or a charity, corporate or unincorporate⁹.

1 This rule is not affected by the Perpetuities and Accumulations Act 1964: see s 15 (4) (cited in PARA 1005 note 7 post).

2 Cf the Fourth Report of the Law Reform Committee (1956) (Cmd 18) PARA 49. As to trusts to keep tombs in repair see PARA 1005 post.

3 See CHARITIES vol 8 (2010) PARA 140. As to the validity of restraints on alienation see also GIFTS vol 52 (2009) PARA 254; PERSONAL PROPERTY vol 35 (Reissue) PARAS 1268-1271 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 231. As to present interests see PARAS 1005, 1006 post.

4 The principle that a perpetuity is forbidden existed before and throughout the reign of Henry VIII (*Hope v Gloucester Corpn* (1855) 7 De GM & G 647 at 658 per Knight-Bruce LJ), but the origin of the legal term 'perpetuity' is not known. The use of the term in the courts does not appear to be reported until *Chudleigh's Case* (1594) 1 Co Rep 113b, Ex Ch; it occurs also in *Anon* (1599) Cary 8; *Corbet's Case* (1600) 1 Co Rep 83b at 84a, 88a; *Mildmay's Case* (1605) 6 Co Rep 40a; *Portington's Case* (1613) 10 Co Rep 35b at 42b; and see *Washborn v Downs* (1671) 1 Cas in Ch 213; *Scatterwood v Edge* (1697) 1 Salk 229; *Stanley v Leigh* (1732) 2 P Wms 686 at 688. The principle forbidding a perpetuity was a principle of the common law: 2 Preston's Abstracts of Title (2nd Edn) 148; *Re Nash, Cook v Frederick* [1910] 1 Ch 1 at 7, CA; *Re Earl of Stamford and Warrington, Payne v Grey* [1912] 1 Ch 343 at 366, 367, CA. It existed prior to the introduction of the modern rule against perpetuities and perhaps was introduced after 18 Edw 1 (*Quia Emptores*) (1289-90) c 1: 2 Preston on Estates (2nd Edn) 307. From early times the test whether a limitation in the future caused a perpetuity appears to have been not so much whether the property was alienable as whether the estate limited was destructible, on alienation, as in the case of contingent remainders and remainders after an estate tail: *Duke of Norfolk's Case* (1683) 3 Cas in Ch 1 at 31; *Termes de la Ley* (1721) sv Perpetuity; cf *Re Hargreaves, Midgley v Tatley* (1889) 43 ChD 401 at 406, CA; and 1 Sanders on Uses and Trusts (5th Edn) 203, 204, cited with approval in *London and South Western Rly Co v Gomm* (1882) 20 ChD 562 at 574, CA per Kay J. The reported decisions passed from the consideration of unbarrable entails to that of indestructible executory limitations in the future, which began to be recognised, within restricted limits, both for lands of inheritance (*Pay's Case* (1602) Cro Eliz 878; *Pells v Brown* (1620) Cro Jac 590; *Snowe v Cuttler* (1664) 1 Lev 135), and for devises of terms of years (*Anon* (1573) 3 Dyer 328b, pl 11; *Manning's Case* (1609) 8 Co Rep 94b; *Lampet's Case* (1612) 10 Co Rep 46b); and see REAL PROPERTY. The modern rule against perpetuities arose from the limits fixed for executory devises and bequests and proceeds on the basis that the validity of an interest depends on the distance in futurity of its vesting: *Duke of Norfolk's Case* (1683) 3 Cas in Ch 1. The necessity for some such rule had been made manifest when it was decided that executory devises were sometimes allowable and were indestructible; see *Pells v Brown* (1620) Cro Jac 590; *Scattergood v Edge* (1697) 12 Mod Rep 278; Lewis's Law of Perpetuity 122 et seq; and see PARA 1005 note 2 post. In relation to instruments taking effect on or after 16 July 1964 (the commencement date of the Perpetuities and Accumulations Act 1964), the 'wait and see' rule applies, which means that the limitation is treated as valid until it becomes established that the interest disposed of cannot vest within the permitted period: see s 3(1) and PARA 1009 post.

5 See PARA 1008 post, where the rule is stated. As to instruments taking effect on or after 16 July 1964 see note 4 supra. Objection has been made to the name 'the rule against perpetuities': see Gray's Rule against Perpetuities (4th Edn) s 2 (where the proposal that the rule should be called 'the rule against remoteness' is mentioned); Jarman on Wills (8th Edn) 304 note (g). In the Law of Property Act 1925 it is termed 'the rule of law relating to perpetuities': see ss 121 (6), 162; and see the Perpetuities and Accumulations Act 1964 s 1 (cited in PARA 1010 post).

6 See the Law of Property Act 1925 s 164 and PARA 1121 et seq post. As to instruments taking effect on or after 16 July 1964 see the Perpetuities and Accumulations Act 1964 s 13 and PARA 1121 post.

7 See PARA 1119 et seq post.

8 See *Saunders v Vautier* (1841) Cr & Ph 240. See further PARA 1119 post and WILLS vol 50 (2005 Reissue) PARA 712.

9 *Wharton v Masterman* [1895] AC 186, HL.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/1. INTRODUCTION/1003. The rule in *Whitby v Mitchell*.

1003. The rule in *Whitby v Mitchell*.

The rule in *Whitby v Mitchell*, sometimes referred to as or confused with the so-called rules against double possibilities or against remote possibilities¹, provided that, in the case of realty, after a limitation for life to a person not in existence at the time when the instrument creating the limitation became operative, a limitation by remainder to any issue of such a person as purchasers was void². It now applies only to limitations or trusts created by an instrument which came into operation before 1 January 1926, and has been abolished as regards limitations or trusts created by any instrument coming into operation after 31 December 1925³. The rule was directed against contingent remainders of real estate, whether legal or equitable⁴, limited to successive generations of unborn issue⁵ and operated as a positive rule of law, independently of the rule against perpetuities⁶. It did not apply to limitations of personal estate⁷ and, where the limitation was in a will, was subject to the cy-près doctrine⁸. In relation to appointments under special powers, the rule was applied as from the date when the instrument creating the power became operative⁹.

1 See Megarry and Wade's Law of Real Property (5th Edn) 1187, 1188. See also Challis's Law of Real Property (3rd Edn) 116-118; Jarman on Wills (8th Edn) 293; Holdsworth, Historical Introduction to Land Law 222 note 6.

2 For the meaning of 'purchaser' see *Whitby v Mitchell* (1890) 44 ChD 85, CA.

3 Law of Property Act 1925 s 161; and see *Re Leigh's Marriage Settlement, Rollo v Leigh* [1952] 2 All ER 57.

4 *Whitby v Mitchell* (1890) 44 ChD 85, CA; *Re Nash, Cook v Frederick* [1910] 1 Ch 1, CA.

5 The rule is older than *Whitby v Mitchell* (1890) 44 ChD 85, CA, for it was a rule of the common law: see *Re Nash, Cook v Frederick* [1910] 1 Ch 1, CA; *Duke of Marlborough v Earl Godolphin* (1759) 1 Eden 404; *Hay v Earl of Coventry* (1789) 3 Term Rep 83 at 86. It was formerly known as the rule against a 'possibility on a possibility', by reason of the existence of a principle forbidding remote possibilities, which was applied to particular instances of remote contingencies. The phrase 'possibility upon a possibility' is, however, incorrect and should not be used, as there was no general rule forbidding in any circumstances a possibility upon a possibility: *Re Nash, Cook v Frederick* supra at 10. It has been suggested (and the Law of Property Act 1925 s 161, in abolishing the rule, proceeds on this footing) that the rule may not have been confined to cases where the second unborn person was the issue of the first unborn person: see *Honywood v Honeywood* (1905) 92 LT 814 at 815, 816, HL per Lord Davey. Cf Morris and Leach's Rule against Perpetuities (2nd Edn) 208 note 56. For an unorthodox view see Hoopes' Rules against Perpetuities (published by the author in May 1961 and printed in Great Britain by the Solicitors' Law Stationery Society).

6 *Honywood v Honeywood* (1905) 92 LT 814 at 815, HL per Lord Davey; *Whitby v Mitchell* (1889) 42 ChD 494 at 500 per Kay J (on appeal (1890) 44 ChD 85, CA); *Re Nash, Cook v Frederick* [1910] 1 Ch 1 at 7, CA. The observations in *Cattlin v Brown* (1853) 11 Hare 372 at 375 per Page Wood V-C, which appear to be to the contrary, were explained in *Re Nash, Cook v Frederick* [1909] 2 Ch 450 at 458, 461, 462 per Eve J. See also *A-G v Cummins* [1906] 1 IR 406.

7 *Re Bowles, Amedroz v Bowles* [1902] 2 Ch 650.

8 See PARA 1004 post.

9 *Whitting v Whitting* (1908) 53 Sol Jo 100; *Re Nash, Cook v Frederick* [1910] 1 Ch 1, CA.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/1. INTRODUCTION/1004. The cy-près doctrine.

1004. The cy-près doctrine.

The doctrine of cy-près¹, as applied to limitations void under the rule in *Whitby v Mitchell*, was a rule of construction of wills², by which, in a proper case, effect could be given to a testator's intention by substituting an effective entailed interest for a devise which went beyond the limits allowed by law. The doctrine operated in the following manner. Where, in a will, there was a limitation of real estate for life to a person unborn, with remainders in tail to his children, or with successive remainders for life to his children indefinitely, and the testator's intention that they should take as purchasers could not be legally effected but there was a clear intention that the estate was to go in a course of descent, then the limitation was construed as such an estate tail in the person to whom the estate was given first for life as would, if unbarred, carry the property to all the persons to whom the testator had invalidly limited it and to no others³. The doctrine was not applicable where the effect would be to exclude persons whom the testator intended to benefit⁴ or to include persons whom he intended not to benefit⁵. Nor did it apply where the remainder was in fee simple⁶. For wills coming into operation after 31 December 1925, this mode of construction is not needed in order to avoid the rule in *Whitby v Mitchell*, which has no application to those wills⁷.

1 As to the application of the cy-près doctrine in relation to charities see CHARITIES vol 8 (2010) PARA 208 et seq; and as to the application of the doctrine to wills see WILLS vol 50 (2005 Reissue) PARA 521.

2 *Parfitt v Hember* (1867) LR 4 Eq 443 at 446; *Hampton v Holman* (1877) 5 ChD 183 at 190. See also *Monypenny v Dering* (1852) 2 De GM & G 145 at 172.

3 *Routledge v Dorril* (1794) 2 Ves 357 at 364, 365 per Arden MR; *Monypenny v Dering* (1852) 2 De GM & G 145 at 172; *Re Richardson, Parry v Holmes* [1904] 1 Ch 332 at 340; *Re Mortimer, Gray v Gray* [1905] 2 Ch 502 at 506, 514, CA; *Re Hobbs, Hobbs v Hobbs* [1917] 1 Ch 569, CA; *Re Mountgarret, Mountgarret v Ingilby* [1919] 2 Ch 294.

4 See eg *Re Rising, Rising v Rising* [1904] 1 Ch 533.

5 *Re Mortimer, Gray v Gray* [1905] 2 Ch 502 at 513, CA; *Monypenny v Dering* (1852) 2 De GM & G 145 at 174, 175.

6 *Bristow v Warde* (1794) 2 Ves 336 at 348, 349; *Hale v Pew* (1858) 25 Beav 335 at 339.

7 As to the abolition of the rule in *Whitby v Mitchell* in relation to instruments coming into effect after 31 December 1925 see PARA 1003 ante. It seems that such a mode of construction may still be applicable for other purposes: see POWERS vol 36(2) (Reissue) PARA 275 (validation of appointments not in conformity with powers). An estate tail can now be created in a will only by the use of the like expressions as those by which before 1 January 1926 a similar estate tail could have been created by deed: see the Law of Property Act 1925 s 130 (1); 2 Key and Elphinstone's Precedents in Conveyancing (15th Edn) 764, 765; and REAL PROPERTY vol 39(2) (Reissue) PARA 119. It has been suggested, however, that the cy-près doctrine may still apply for the purpose of validating a limitation which infringes the existing rule against perpetuities (see PARA 1002 ante, 1008 et seq post) where after a life interest to an unborn person there is a remainder in tail to his issue and strict words of limitation are employed: see the article by R E Megarry in 55 LQR 422, and Megarry and Wade's Law of Real Property (5th Edn) 1189. See also Hoopes' Rules against Perpetuities (as to publication and printing of this work see PARA 1003 note 5 ante) and 5th Supplement dated 10 October 1968. See also Hoopes' Rules against Perpetuities 120-125. Cf Challis's Law of Real Property (3rd Edn) 118n.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/1. INTRODUCTION/1005. Extended meanings of 'perpetuity'.

1005. Extended meanings of 'perpetuity'.

Although the law of perpetuities as treated in this title is only conversant with future interests¹, in the history of English law² the word 'perpetuity' has sometimes been used in a wider sense, and certain present interests have been held void under the name of perpetuities. Examples of those present interests are:

- 1 (1) present estates and interests with an unauthorised mode of devolution, for example an estate of inheritance not known to the common law³, an unbarrable entail⁴, an estate in which successive heirs take life estates only⁵, and the attempted entail of a chattel made prior to 1 January 1926⁶;
- 2 (2) interests held on perpetual non-charitable trust, where no person or persons can take any benefit⁷, for example trusts to keep in repair a tomb not part of the fabric of a church⁸; and
- 3 (3) gifts to trustees for non-charitable indefinite objects⁹, or for non-charitable unincorporated institutions or societies which may last for an indefinite time¹⁰.

In relation to head (3) above a gift to an unincorporated association may be construed in any one of four ways:

- 4 (a) as a gift to the members of the association at the relevant date beneficially¹¹, as joint tenants or as tenants in common, so that each such member is entitled, on severance if they take as joint tenants, to an aliquot share, whether or not he continues to be a member of the association; such a gift is unobjectionable;
- 5 (b) as a gift to the existing members not as joint tenants but subject to their contractual rights and liabilities towards each other as members of the association; such a gift is not open to objection for perpetuity unless there is something in its terms or circumstances or the rules of the association which precludes the members at any given time from dividing the gift among themselves on the footing that they are together solely and absolutely entitled to it;
- 6 (c) the terms or circumstances of the gift or the rules of the association may show that the gift is not to be at the disposal of the members for the time being but is to be held in trust or applied for the purposes of the association as a quasi-corporate entity, that is for present and future members indefinitely; such a gift failed prior to the Perpetuities and Accumulations Act 1964 unless the association was a charitable body but it is submitted that since that Act such a gift will not fail for perpetuity but will operate in favour of those members ascertained within the perpetuity period¹²;
- 7 (d) as a gift to the trustees or other proper officer of the association on trust to carry into effect the purposes of the association; on this construction, unless the purposes are charitable, the rule in *Morice v Bishop of Durham*¹³ applies and the gift will fail for want of a beneficiary.

The second type of gift operates as an accretion to the funds of the association and becomes subject to the contract which governs the rights of members among themselves, each member being entitled to insist that the gift be applied in accordance with the rules of the association¹⁴. The essential characteristic of this type, if it is to be valid, is that the members should be free to distribute or dispose of the gift among themselves, whether under the existing rules of the association or by changing the rules for that purpose¹⁵. The mere fact that the members have joined together for some altruistic purpose rather than for personal advantage will not

invalidate the gift even if made in the hope or expectation, without imposing any trust or obligation, that it will be used for that purpose¹⁶. Even a gift which specifies a purpose which falls within the powers of the association may fall within this second category if the members could by appropriate action vest the property in themselves¹⁷. Therefore no question of perpetuity can arise when the trust is intended to be one for the benefit of the individual members of such a body at the time when the gift becomes operative, or where the property can be transferred to a common fund held for such a body, and, when so transferred, will not be subject to any trusts which will prevent the existing members from spending it as they please¹⁸.

1 Future interests were subject to the restraint of certain rules of limitation at common law eg the rule requiring a preceding estate of freehold to support a contingent remainder, and the rule that a limitation in the future is, if possible, construed as a contingent remainder and not as an executory limitation: see REAL PROPERTY. These common law rules were themselves designed to prevent perpetuity: *Re Nash, Cook v Frederick* [1910] 1 Ch 1 at 7, CA. Executory interests in land on failure of issue of a person are also subject to be defeated by the statutory rule now enacted by the Law of Property Act 1925 s 134: see REAL PROPERTY vol 39(2) (Reissue) PARA 178.

2 See PARA 1002 note 4 ante. Some learned writers are of opinion that the earliest meaning of the term 'perpetuity' was an inalienable estate, particularly an estate tail intended to be unbarrable: Jarman on Wills (8th Edn) 291; (1909) 25 LQR 385 et seq; 49 Sol Jo 414; Gray's Rule against Perpetuities (4th Edn) ss 141.5, 159. Early definitions of 'perpetuity' usually refer to an inalienable estate: see *Washborn v Downs* (1671) 1 Cas in Ch 213 ('a perpetuity is where if all that have interest join and yet cannot bar or pass the estate'). Lord St Leonards, in a note to Gilbert's Law of Uses and Trusts (3rd Edn) 260, defines 'perpetuity' as 'such a limitation of property as renders it unalienable beyond the period allowed by law'. It is generally considered that the modern rule against perpetuities was an invention of the chancellors as to trusts and equitable interests (as in *Duke of Norfolk's Case* (1683) 3 Cas in Ch 1; *Chalfont v Okes* (1674) 1 Cas in Ch 239; *Lloyd v Carew* (1697) Prec Ch 72, HL) adopted at common law as to legal rights under uses and executory devises: see *Re Ridley, Buckton v Hay* (1879) 11 ChD 645 at 649; *A-G v Cummins* [1906] 1 IR 406 at 408. A definition under the modern rule is given in PARA 1008 note 2 post. For early instances of the popular use of the word 'perpetuity' see the Oxford English Dictionary (2nd Edn) vol XI p 587; and for the history of the rule see 2 Hargraves' Judicial Arguments 2 et seq (argument in *Thelluson v Woodford* (1799) 4 Ves 227); Lewis's Law of Perpetuity 140 et seq; Gray's Rule against Perpetuities (4th Edn) ss 123-199. See also PARA 1002 note 4 ante; Hoopes' Rules against Perpetuities 6, 38, 50 (as to the publication and printing of this work see PARA 1003 note 5 ante); Morris and Leach's Rule against Perpetuities (2nd Edn) 7 and also 1-13. As to the rules applicable to future interests see PARA 1002 ante.

3 *Mildmay's Case* (1605) 6 Co Rep 40a. According to this case, and *Scattergood v Edge* (1697) 12 Mod Rep 278 at 282 per Powell J, estates tail, from the time of 13 Edw I (Statute of Westminster) (1285) c 1 (*De Donis Conditionalibus*) until common recoveries were allowed, were looked upon as perpetuities: Piggott on Common Recoveries (2nd Edn) 10. A common law fee upon a fee was described as a perpetuity in *Gay v Gay* (or *Jay v Jay*) (1651) Sty 258 at 274.

4 Gilbert's Law of Uses and Trusts (3rd Edn) 260; *Pewterers Co v Governors of Christ's Hospital* (1683) 1 Vern 161.

5 *Chudleigh's Case* (1594) 1 Co Rep 113b at 138a per Popham CJ; *Clare v Clare* (1734) Cas temp Talb 21 at 26 per Lord Talbot LC; *Wollen v Andrewes* (1824) 2 Bing 126; and see *Manning and Andrews Case* (1576) 1 Leon 256. See also *Kennedy v Kennedy* [1914] AC 215, PC (gift of residue to trustees upon a discretionary trust for maintenance of a dwelling house until its sale at an indefinite future time), distinguished in *Re Cassel, Public Trustee v Mountbatten* [1926] Ch 358 (trust for maintenance of dwelling house limited to period of enjoyment by beneficiaries whose interests must vest within the rule against remoteness of vesting); *Beachway Management Ltd v Wisewell* [1971] Ch 610, [1971] 1 All ER 1 (fluctuating rentcharge; following *Re Cassel, Public Trustee v Mountbatten* supra).

6 *Tatton v Mollineux* (1610) Moore KB 809; *Ireland v Payne* (1637) Poll 25; *Apprice v Flower* (1660) Poll 27 (cases concerning limitations of terms). Under the Law of Property Act 1925 entailed interests may be created in personal property: see s 130; and see PARA 1081 post; and SETTLEMENTS vol 42 (Reissue) PARA 939. It would appear that the words 'entailed interest' do not extend to a base fee: *Re Hind, Bernstone v Montgomery* [1933] Ch 208.

7 See *Re Church Patronage Trust, Laurie v A-G* [1904] 2 Ch 643 at 648, CA and ECCLESIASTICAL LAW vol 14 para 800. The Perpetuities and Accumulations Act 1964 does not affect the position with regard to non-charitable purpose trusts: see s 15 (4). Thus the 'wait and see' provisions will not be available; but for a view that the 80-year period allowed by s 1 may be specified see Maudsley's Modern Law of Perpetuities 178. A trust which, although expressed as a purpose, is directly or indirectly for the benefit of individuals has been held to be

outside the mischief of the 'beneficiary principle': see *Re Denley's Trust Deed*, *Holman v H H Martyn & Co Ltd* [1969] 1 Ch 373 at 384, 385, [1968] 3 All ER 65 at 70; sed quaere whether such a trust falls within the Perpetuities and Accumulations Act 1964 s 15 (4). The better view seems to be that it does: cf [1975] ASCL 448, 449.

8 See CHARITIES vol 8 (2010) PARA 61. A trust or condition to repair a tomb is not in itself illegal, and, if limited within the perpetuity period, so that no remote future interest will arise on its determination, it may be a valid condition: see CHARITIES vol 8 (2010) PARA 61; and see *Re Aberconway's Settlement Trusts*, *McLaren v Aberconway* [1953] Ch 647, [1953] 2 All ER 350, CA (trust for upkeep of garden limited to perpetuity period); *Re Lipinski's Will Trusts*, *Gosschalk v Levy* [1976] Ch 235 at 246, [1977] 1 All ER 33 at 42, 43. The Law Reform Committee recommended that it should be possible to subject a limited sum of money (say £1,000) to a trust valid in perpetuity, to use the income for the maintenance of any grave, tomb or monument (Fourth Report of the Law Reform Committee (1956) (Cmd 18) PARA 53); but this was not implemented by the Perpetuities and Accumulations Act 1964 (see s 15 (4)). A trust or condition for maintaining specified animals is not charitable, but, if it does not violate any rule against remoteness, is not in itself unlawful: see CHARITIES vol 8 (2010) PARA 60; RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 820. See also *Re Kelly*, *Cleary v Dillan* [1932] IR 255 (where the bequest for the support of the testator's dogs was construed as a severable trust for 21 years, if any of the dogs should live so long, and the gift over was void for remoteness); distinguished in *Re Wood*, *Barton v Chilcott* [1949] Ch 498, [1949] 1 All ER 1100. It seems that an animal's life cannot constitute a life for the purpose of the rule against perpetuities: see PARA 1014 note 6 post. The Parish Councils and Burial Authorities (Miscellaneous Provisions) Act 1970 permits a local authority to enter into agreements for the maintenance of graves, vaults, tombstones or other memorials for a period not exceeding 99 years: see s 1 (amended by the Local Authorities' Cemeteries Order 1974, SI 1974/628, art 17, Sch 3, except in its application to the Isles of Scilly) and CREMATION AND BURIAL.

9 *Thomson v Shakespear* (1860) 1 De GF & J 399; *Carne v Long* (1860) 2 De GF & J 75; *Re Jones*, *Parker v Lethbridge* (1898) 79 LT 154; *Re Sahal's Will Trusts*, *Alliance Assurance Co Ltd v A-G* [1958] 3 All ER 428, [1958] 1 WLR 1243. See also *Re Macaulay's Estate*, *Macaulay v O'Donnell* [1943] Ch 435n, HL; *Leahy v A-G for New South Wales* [1959] AC 457, [1959] 2 All ER 300, PC; *Re Denley's Trust Deed*, *Holman v H H Martyn & Co Ltd* [1969] 1 Ch 373 at 383, [1968] 3 All ER 65 at 69; *Re Hargreaves* [1973] Qd R 448.

10 *Re Dutton, ex p Peake* (1878) 4 Ex D 54; *Re Clark's Trust* (1875) 1 ChD 497; *Re Swain*, *Phillips v Poole* (1908) 99 LT 604. Cf *Re Bowman* [1915] 2 Ch 447 at 451, 461, CA (affd sub nom *Bowman v Secular Society Ltd* [1917] AC 406, HL); *Re Bushnell*, *Lloyds Bank Ltd v Murray* [1975] 1 All ER 721 at 727, [1975] 1 WLR 1596 at 1602. See also *Re Astor's Settlement Trusts*, *Astor v Scholfield* [1952] Ch 534 at 540, [1952] 1 All ER 1067 at 1070 (where dicta of Lord Parker in *Bowman v Secular Society Ltd* supra at 437, 441 were applied); *Re Wightwick's Will Trusts*, *Official Trustees of Charitable Funds v Fielding-Ould* [1950] Ch 260, [1950] 1 All ER 689 (gift of income for indefinite period to society for furtherance of non-charitable purposes void). Cf *Re Chambers' Will Trusts*, *Official Trustees of Charitable Funds v British Union for the Abolition of Vivisection* [1950] Ch 267 (where, following *Re Chardon*, *Johnston v Davies* [1928] Ch 464, the court held the gift to be alienable and therefore valid); *Re Conner*, *Provincial Bank of Ireland Ltd v General Cemetery Co of Dublin and Lucas* [1960] IR 67 (gift for maintenance and care of family vault held valid; approving *Re Chardon*, *Johnston v Davies* supra); and see CHARITIES vol 8 (2010) PARA 61. As to the rule that institutions, the objects of which are solely or substantially the private advantage of the members, are not charitable, and that gifts to those institutions are bad if the gifts tend towards perpetuities, see CHARITIES vol 8 (2010) PARA 62.

11 *Re Recher's Will Trusts*, *National Westminster Bank Ltd v National Anti-Vivisection Society Ltd* [1972] Ch 526, [1971] 3 All ER 401, following *Leahy v A-G for New South Wales* [1959] AC 457, [1959] 2 All ER 300, PC and *Neville Estates Ltd v Madden* [1962] Ch 832, [1961] 3 All ER 769. Cf *Re Edis's Trusts*, *Campbell-Smith v Davies* [1972] 2 All ER 769; sub nom *Re Edis's Declaration of Trust* [1972] 1 WLR 1135; *News Group Newspapers Ltd v Society of Graphical and Allied Trades 1982* [1986] ICR 716, CA.

12 See the Perpetuities and Accumulations Act 1964 ss 3 (1), (4), 4 (4) and [1976] ASCL 421 (J Hackney). The effect of the 1964 Act was considered neither by Vinelott J in *Re Grant's Will Trusts* [1979] 3 All ER 359, [1980] 1 WLR 360 nor by Brightman J in *Re Recher's Will Trusts*, *National Westminster Bank Ltd v National Anti-Vivisection Society Ltd* [1972] Ch 526, [1971] 3 All ER 401, who both restated the old rule that, if construed as a gift to all members, present and future, beneficially, it would be void for perpetuity.

13 Is the rule in *Morice v Bishop of Durham* (1805) 10 Ves 522, affg (1804) 9 Ves 399; and see *Leahy v A-G for New South Wales* [1959] AC 457, [1959] 2 All ER 300, PC; *Re Grant's Will Trusts* [1979] 3 All ER 359, [1980] 1 WLR 360; TRUSTS vol 48 (2007 Reissue) PARA 655.

14 See eg *Re Recher's Will Trusts*, *National Westminster Bank Ltd v National Anti-Vivisection Society Ltd* [1972] Ch 526, [1971] 3 All ER 401; *Neville Estates Ltd v Madden* [1962] Ch 832, [1961] 3 All ER 769 (fund to be held on trust for purposes of synagogue); and see *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society*, *Thompson v Holdsworth (No 2)* [1979] 1 All ER 623 at 626, 627, [1979] 1 WLR 936 at 940.

15 See *Leahy v A-G for New South Wales* [1959] AC 457, [1959] 2 All ER 300, PC; *Re Lipinski's Will Trusts, Gosschalk v Levy* [1976] Ch 235, [1977] 1 All ER 33; *Re Grant's Will Trusts* [1979] 3 All ER 359 at 366, [1980] 1 WLR 360 at 368.

16 See *Re Grant's Will Trusts* [1979] 3 All ER 359 at 365, [1980] 1 WLR 360 at 367. Cf *Re Lipinski's Will Trusts, Gosschalk v Levy* [1976] Ch 235, [1977] 1 All ER 33 (fund to be used 'solely in helping construct new buildings for the association and/or improvements to the said buildings' valid).

17 See *Re Lipinski's Will Trusts, Gosschalk v Levy* [1976] Ch 235 at 247, [1977] 1 All ER 33 at 43.

18 *Cocks v Manners* (1871) LR 12 Eq 574 at 586; *Re Delany's Estate* (1882) 9 LR Ir 226, Ir CA; *Re Clarke, Clarke v Clarke* [1901] 2 Ch 110; *Re Drummond, Ashworth v Drummond* [1914] 2 Ch 90 (trust of proceeds of sale of residue for old boys club, to be utilised as the committee of the club should think best, valid). Cf *Re Patten, Westminster Bank v Carlyon* [1929] 2 Ch 276 at 285 et seq; *Re Prevost, Lloyds Bank Ltd v Barclays Bank Ltd* [1930] 2 Ch 383; *Re Price, Midland Bank Executor and Trustee Co Ltd v Harwood* [1943] Ch 422, [1943] 2 All ER 505; and see *Re Endacott, Corpe v Endacott* [1960] Ch 232, [1959] 3 All ER 562, CA (trust 'for the purpose of providing some useful memorial to myself' invalid); *Bacon v Pianta* (1966) 114 CLR 634 (Aust HC); *Neville Estates Ltd v Madden* [1962] Ch 832, [1961] 3 All ER 769; *Re Recher's Will Trusts, National Westminster Bank Ltd v National Anti-Vivisection Society Ltd* [1972] Ch 526, [1971] 3 All ER 401. A question may arise whether the body must be and is capable of ascertainment: *Re Delany's Estate* supra at 243 per Deasy LJ. Interests held by or given to a fluctuating body which may last indefinitely may be rendered valid by being statutory (*Prestney v Colchester Corpn and A-G* (1882) 21 ChD 111), charitable (*Goodman v Saltash Corpn* (1882) 7 App Cas 633, HL), or derived under a Crown grant to a corporation with a condition in favour of the body or incorporating the body for the purpose (see *Willingale v Maitland* (1866) LR 3 Eq 103 at 109 and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 871). In the last case there must, however, be evidence of the existence of such a corporation: *Lord Rivers v Adams* (1878) 3 Ex D 361; *Lord Chesterfield v Harris* [1908] 2 Ch 397 at 423, CA (affd [1911] AC 623, HL). See also CHARITIES vol 8 (2010) PARAS 60, 62.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/1. INTRODUCTION/1006. Unobjectionable perpetual interests.

1006. Unobjectionable perpetual interests.

Certain estates and interests in property may last for an indefinite time, but, if created or existing as present interests¹, so as to be vested in some person, persons or corporation, there is no objection to them on any ground of perpetuity². These estates and interests comprise the following:

- 8 (1) easements and profits à prendre³;
- 9 (2) rentcharges and other similar interests in land lasting indefinitely⁴, and all remedies to enforce them⁵. It is expressly provided that the rule against perpetuities is not to apply to the statutory powers or remedies of distress, entry or limitation of a term for the recovery of an annual sum charged on land or otherwise becoming exercisable or enforceable on the breach of any condition or other requirement relating to that sum⁶ or to the statutory powers or remedies for non-payment or breach of covenant where the rentcharge has been equitably apportioned⁷, or to like powers or remedies expressly conferred by an instrument⁸; moreover, it has been confirmed by statute that the rule against perpetuities does not apply, and is to be deemed never to have applied, to any power to distrain on or to take possession of land or its income given by way of indemnity against a rent, whether charged upon or payable in respect of any part of that land or not⁹; to any rentcharge created only as an indemnity against another rentcharge, even though the indemnity rentcharge may only arise or become payable on breach of a condition or stipulation¹⁰; to any power, whether exercisable on breach of a condition or stipulation or not, to retain or withhold payment of any instalment of a rentcharge as an indemnity against another rentcharge¹¹; or to any grant, exception or reservation of any right of entry on, or user of, the surface of land or of any

- easements¹², rights or privileges over or under land for the purpose of executing certain works¹³;
- 10 (3) restrictive covenants and conditions running with land in equity¹⁴;
 - 11 (4) covenants and conditions running with land at law¹⁵;
 - 12 (5) customary rights¹⁶;
 - 13 (6) interests conferred on charities¹⁷;
 - 14 (7) mortgages¹⁸;
 - 15 (8) interests held by corporations¹⁹;
 - 16 (9) rights conferred by, or exercisable in relation to, certain covenants entered into in accordance with the Leasehold Reform Act 1967²⁰;
 - 17 (10) interests derived under or by virtue of any statute²¹;
 - 18 (11) gifts to the Secretary of State²² upon trust to use the income of the gifts, either for a limited time or in perpetuity, for or towards the upkeep of buildings of outstanding historic or architectural interest²³;
 - 19 (12) gifts to the Historic Buildings and Monuments Commission for England upon trust to use the income thereof, either for a limited time or in perpetuity, for or towards the upkeep of buildings of outstanding historic or architectural interest or of gardens or other land of outstanding interest²⁴.

1 When created to arise in the future, the interests referred to *infra* appear in general to be subject to the rule against perpetuities, except in so far as they may be derived under or by virtue of a statute or provision to the contrary may be made by statute. As to the creation of easements in the future see PARA 1025 note 4 post; and as to future gifts to charities see PARAS 1055, 1056 post.

2 See also PARA 1045 post.

3 See *London and South Western Rly Co v Gomm* (1882) 20 ChD 562 at 583, CA per Jessel MR; Gray's Rule against Perpetuities (4th Edn) s 279 and see generally EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 1 et seq; *Dunn v Blackdown Properties Ltd* [1961] Ch 433, [1961] 2 All ER 62; *Newham v Lawson* (1971) 22 P & CR 852. See also *Smith v Colbourne* [1914] 2 Ch 533, CA (where the opinion was expressed that a clause in an agreement for sale of buildings giving an adjoining owner a right to enter and block up windows, if it gave an interest in land, would be void for perpetuity).

4 *Keppell v Bailey* (1834) 2 My & K 517 at 528, 529 per Lord Brougham LC; *Beachway Management Ltd v Wisewell* [1971] Ch 610 at 614, [1971] 1 All ER 1 at 3 per Plowman J. The Rentcharges Act 1977 prohibits the creation of certain rentcharges after 22 August 1977 and provides for the extinguishment of certain others created before that date after 60 years: see ss 2, 3 and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 774 et seq. See also Lewis's Law of Perpetuity 599, where it is pointed out that, although corporeal property is clogged when subjected to such interests and its value may be proportionately decreased, its alienability is unaffected and its aptness for commercial dealings remains. Alienability is not the only test: see *Re Hargreaves, Midgley v Tatley* (1889) 43 ChD 401 at 406, CA per Cotton LJ.

5 *Jemott v Cowley* (1667) 1 Saund 112; *Foster v Foster* (1700) 2 Vern 386 (where no question of perpetuity was raised). Rights of entry pass on an assignment of the rentcharge to the assignee as part of his security: *Havergill v Hare* (1618) Cro Jac 510. A rentcharge securing a covenant to pay royalties on a possibly remote event has been held not to be within the rule against perpetuities: *Morgan v Davey* (1883) Cab & El 114; and see Gray's Rule against Perpetuities (4th Edn) s 273A. With regard to demised land the entry under the usual condition is valid by the Law of Property Act 1925 s 141: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 567.

6 See *ibid* s 121 (6) (amended by the Perpetuities and Accumulations Act 1964 s 11 (2)), which is applied to rentcharges charged on other rentcharges by the Law of Property Act 1925 s 122 (3); the Perpetuities and Accumulations Act 1964 s 11 (1); and RENTCHARGES AND ANNUITIES vol 39 (2) (Reissue) PARA 867. Cf the Third Report of the Commissioners on the Law of Real Property (1832) 37. The ambit of the Law of Property Act 1925 s 121 (6) was not entirely clear, and it was suggested that s 121 (6), together with s 4 (3) (see PARA 1029 post), ss 162, 190 (8) (see *infra*), should be reconsidered: see the Fourth Report of the Law Reform Committee (1956) (Cmd 18) PARAS 42, 43. The Perpetuities and Accumulations Act 1964 s 11 now makes it clear that all powers and remedies for the recovery of a rentcharge are exempt from the rule, but s 11 (2) repealed part of the Law of Property Act 1925 s 121 (6), referring to 'the same or like powers or remedies conferred by any instrument for recovering or compelling payment of any annual sum', and this repeal may give rise to difficulties with regard to the application of the rule to powers and remedies expressly conferred by an instrument in respect of a rentcharge created prior to 16 July 1964: see 2 Wolstenholme and Cherry's Conveyancing Statutes (13th Edn) 145. The remedies available under the Law of Property Act 1925 s 121 have been extended to rentcharges

created under the Copyhold Act 1894, notwithstanding the repeal of the 1894 Act: Statute Law (Repeals) Act 1969 s 3.

7 See RENTCHARGES AND ANNUITIES.

8 Law of Property Act 1925 s 190 (8).

9 Ibid s 162 (1) (a). Section 162 applies to instruments coming into operation before, on or after 1 January 1926: s 162 (2).

10 Ibid s 162 (1) (b). See also note 9 supra. In so far as s 162 (1) (b) applies to rentcharges created by way of indemnity against other rentcharges, it in effect confirms the decision in *Cassamajor v Strode* (1821) Jac 630: see PARA 1053 note 2 post.

11 Law of Property Act 1925 s 162 (1) (c). See also note 9 supra.

12 See *Dunn v Blackdown Properties Ltd* [1961] Ch 433 at 438, [1961] 2 All ER 62 at 65; followed in *Newham v Lawson* (1971) 22 P & CR 852 at 855, 856; and see Morris and Leach's Rule against Perpetuities (2nd Edn) 229.

13 Law of Property Act 1925 s 162 (1) (d). See also note 9 supra. The works so specified are (1) winning, working, inspecting, measuring, converting, manufacturing, carrying away and disposing of mines and minerals; (2) inspecting, grubbing up, felling and carrying away timber and other trees, and their tops and lops; (3) executing repairs, alterations or additions to any adjoining land, or the buildings and erections on it; and (4) constructing, laying down, altering, repairing, renewing, cleansing and maintaining sewers, watercourses, cesspools, gutters, drains, water pipes, gas pipes, electric wires or cables or other like works: s 162 (1) (d) (i)-(iv).

14 See *McLean v McKay* (1873) LR 5 PC 327; EQUITY vol 16(2) (Reissue) PARA 615 et seq. Cf *Dunn v Flood* (1883) 25 ChD 629 at 633 (on appeal (1885) 28 ChD 586 at 592, CA) (right of entry for breach of restrictive covenant held too remote). For criticism of the view that the rule does not apply to restrictive covenants see an article by G Battersby (1961) 25 Conveyancer and Property Lawyer 415 at 425-427.

15 See *Muller v Trafford* [1901] 1 Ch 54 at 60, 61; *Coronation Street Industrial Properties Ltd v Ingall Industries plc* [1989] 1 All ER 979, [1989] 1 WLR 304, HL. As to the running of covenants entered into between landlord and tenant see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 554 et seq. As to covenants to renew leases see PARA 1039 post. In a lease covenants as between landlord and tenant in defeasance of the lease are not invalid under the rule against perpetuities: *Re Tyrrell's Estate* [1907] 1 IR 292 at 298, Ir CA. For comment on dicta suggesting the contrary in *Roe d Hunter v Galliers* (1787) 2 Term Rep 133 at 141 per Buller J see Challis's Law of Real Property (3rd Edn) 186. As to covenants running with the land generally see EQUITY vol 16(2) (Reissue) PARA 613 et seq; SALE OF LAND vol 42 (Reissue) PARA 331 et seq.

16 See Gray's Rule against Perpetuities (4th Edn) ss 572-588. As to customary rights generally see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 629 et seq.

17 *Goodman v Saltash Corpn* (1882) 7 App Cas 633 at 642, 650, 665, HL; *Re Christchurch Inclosure Act* (1888) 38 ChD 520 at 530, 531, 532, CA (affd sub nom *A-G v Meyrick* [1893] AC 1, HL); Lewis's Law of Perpetuity 689; and see CHARITIES vol 8 (2010) PARAS 140-144. A gift to a charity, unless it takes effect on the failure or determination of a previous gift to charity, must take effect, if at all, within the period allowed by the rule against perpetuities: *Re Spensley's Will Trusts*, *Barclays Bank Ltd v Staughton* [1954] Ch 233, [1954] 1 All ER 178; *Re Bushnell, Lloyds Bank Ltd v Murray* [1975] 1 All ER 721 at 731, [1975] 1 WLR 1596 at 1607; and see CHARITIES vol 8 (2010) PARA 141. In relation to instruments taking effect on or after 16 July 1964 the 'wait and see' provisions of the Perpetuities and Accumulations Act 1964 s 3 may save the gift (see PARA 1009 post), and a fixed period not exceeding 80 years may be specified under s 1 (see PARA 1010 post).

18 *Knightsbridge Estates Trust Ltd v Byrne* [1939] Ch 441 at 463, [1938] 4 All ER 618 at 631, CA; affd [1940] AC 613 at 625, [1949] 2 All ER 401 at 408, HL; and see PARAS 1116, 1117 post.

19 As to a corporation's capacity to own property generally see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1245 et seq. The Mortmain and Charitable Uses Act 1888 and the Acts amending that Act, which restricted the assurance of land to corporations, were repealed by the Charities Act 1960 ss 38 (1), 48 (2), Sch 7 Pt II (repealed). As to the law before the repeal see CHARITIES vol 8 (2010) PARAS 82-83.

20 See the Leasehold Reform Act 1967 ss 29 (3), 30 (3), Sch 4 para 1 (6) and LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARAS 1456, 1477.

21 *Prestney v Colchester Corpn and A-G* (1882) 21 ChD 111; *Re Christchurch Inclosure Act* (1888) 38 ChD 520 at 530, CA. See also *Sevenoaks, Maidstone and Tunbridge Rly Co v London, Chatham and Dover Rly Co*

(1879) 11 ChD 625 at 635 per Jessel MR. As to remoteness in a statutory agreement see *Manchester Ship Canal Co v Manchester Racecourse Co* [1900] 2 Ch 352 at 359, 360; affd [1901] 2 Ch 37 at 50, CA. Cf *Taff Vale Rly Co v Amalgamated Society of Railway Servants* [1901] AC 426 at 429, HL. Accordingly, estates tail may be rendered unbarrable by statute, causing a statutory perpetuity: Feigned Recoveries Act 1542 s 1; Fines and Recoveries Act 1833 s 18 (revived by the Expiring Laws Act 1925 s 1 (2), Sch 1 Pt II). Cf *Re Bolton Estates, Russell v Meyrick* [1903] 2 Ch 461, CA; and see REAL PROPERTY. Although the Feigned Recoveries Act 1542 has now been repealed as obsolete, the repeal of s 1 does not make barrable any entail existing at 22 October 1969 which was unbarrable by reason of that section: Statute Law (Repeals) Act 1969 s 4 (4). Since 16 June 1977 the Expiring Laws Act 1925 has also been repealed, but the repeal does not affect the previous operation of that Act or anything duly done or suffered under it: Interpretation Act 1978 s 16 (1) (b). Powers of alienation are given in certain cases to a tenant in tail who is restrained by statute from barring the entail: Settled Land Act 1925 s 20 (1) (i), replacing the Settled Land Act 1882 s 58 (1) (i) (repealed); and see REAL PROPERTY; SETTLEMENTS.

22 As to the Secretary of State see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 802.

23 See the Historic Buildings and Ancient Monuments Act 1953 s 8 (2) and TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1067. As to the validity of gifts over of endowment funds on charitable trusts see PARA 1056 post.

24 See *ibid* ss 8A (2), 8B (2) (as added) and TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARAS 1068-1069 respectively.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/1. INTRODUCTION/1007. The Perpetuities and Accumulations Act 1964.

1007. The Perpetuities and Accumulations Act 1964.

The Perpetuities and Accumulations Act 1964 is a landmark in the history of perpetuities and accumulations. It does not abolish the common law rule against perpetuities but rather is designed to supplement it. At the heart of the Act is the principle of 'wait and see' under which the validity of a disposition is tested by reference to actual as opposed to possible events¹. As this principle is applicable only in respect of dispositions which would have been void prior to 16 July 1964, the commencement date of the Act, and as the Act, with one exception², is not retrospective and does not apply in relation to instruments taking effect before that date³, the common law rule remains of fundamental importance.

In general, therefore, the correct approach to a perpetuities problem is first to decide whether the disposition is valid under the common law rule. If it is, the Act has no application; if it is not and the instrument by which it was made took effect on or after 16 July 1964, the Act may be invoked to save it⁴.

1 See the Perpetuities and Accumulations Act 1964 s 3 and PARA 1009 post.

2 See *ibid* s 8 (2) (trustees' administrative powers) and PARA 1034 note 12 post.

3 See *ibid* s 15 (5) (cited in PARA 1009 note 2 post).

4 Accordingly, an exposition of the common law position predominates in the text of this title with the provisions of the Perpetuities and Accumulations Act 1964 incorporated as appropriate. It seems logical to assume that the provisions of the Act are to be applied in the order in which they appear; thus (1) 'wait and see' (see s 3 and PARA 1009 post) whether the interest in fact vests within the perpetuity period; (2) if it becomes apparent that it cannot, apply the age-reduction rules (see s 4 (as amended) and PARA 1070 post); and (3) if necessary, apply the class-closing and exclusion rules (see s 4 (as amended)). In the event of 'proceedings' the court would begin by applying the appropriate presumptions (see s 2 and PARA 1066 post): see Megarry and Wade's Law of Real Property (5th Edn) 250; Cheshire and Burn's Modern Law of Real Property (14th Edn) 302; (1964) 80 LQR 492. For a criticism of the failure to abolish the common law rule see Maudsley's Modern Law of Perpetuities 111 et seq; cf the Western Australian Law Reform (Property, Perpetuities and Succession) Act 1962 s 10; and see (1962) 6 WAL Rev 58.

For proposals for the reform or abolition of the rule against perpetuities see *The Rules against Perpetuities and Excessive Accumulations* (Law Com consultation paper no 133).

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2.
THE RULE AGAINST PERPETUITIES/(1) PERIOD ALLOWED FOR SUSPENSION OF VESTING/(i)
Statement of the Rule/1008. Summary of the rule.

2. THE RULE AGAINST PERPETUITIES

(1) PERIOD ALLOWED FOR SUSPENSION OF VESTING

(i) Statement of the Rule

1008. Summary of the rule.

The rule against perpetuities¹ may be shortly enunciated as follows. An executory devise or other future limitation to be valid must vest, if at all, within a life or lives in being and 21 years and a possible period for gestation after; it is not sufficient that it may vest within that period. It must be good in its creation, and, unless it is created in such terms that it cannot vest after the expiration of a life or lives in being and 21 years and the period allowed for gestation, it is not valid, and subsequent events cannot make it valid².

Every condition subsequent which, but for the above rule, would render void a validly created estate or interest is to that extent inoperative³.

Alterations in the rule in relation to instruments taking effect on or after 16 July 1964 are dealt with subsequently⁴.

1 As to the origins of the rule see PARA 1002 note 4 ante.

2 *Lord Dungannon v Smith* (1845) 12 Cl & Fin 546 at 563, HL per Cresswell J; *Hancock v Watson* [1902] AC 14 at 17, 18, HL per Lord Davey. Cf *Re Thompson, Thompson v Thompson* [1906] 2 Ch 199 at 202 per Joyce J, but see *Re Fane, Fane v Fane* [1913] 1 Ch 404 at 415, CA per Buckley LJ; 2 Preston's Abstracts of Title (2nd Edn) 159. For the purposes of this short statement, the period of gestation is made a part of the definition; it is better for some purposes to omit it, and to add to the rule 'for the purposes of this rule a child en ventre sa mère is considered as a life in being': see *Re Wilmer's Trusts, Moore v Wingfield* [1903] 2 Ch 411 at 422, 423, CA; and see *Villar v Gilbey* [1907] AC 139 at 149, HL, and *Elliot v Lord Joicey* [1935] AC 209 at 225 et seq, HL, where the effect of *Villar v Gilbey* supra is explained; *Re Stern, Bartlett v Stern* [1962] Ch 732 at 737, [1961] 3 All ER 1129 at 1132, where Russell J said that, for the purposes of the rule against perpetuities, conception is treated as equivalent to birth. See also Gray's Rule against Perpetuities (4th Edn) s 201; Morris and Leach's Rule against Perpetuities (2nd Edn) 1. The definition of 'perpetuity' contained in Lewis's Law of Perpetuity 164 is 'a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation'. This definition has been accepted in several cases: see *London and South Western Rly Co v Gomm* (1882) 20 ChD 562 at 581, CA; *Dunn v Flood* (1883) 25 ChD 629 at 633 per North J; *Redington v Browne* (1893) 32 LR Ir 347 at 355 per Bewley J; *Re Ashforth, Sibley v Ashforth* [1905] 1 Ch 535 at 541; *Re Tyrrell's Estate* [1907] 1 IR 292 at 295, Ir CA; *Mann, Crossman and Paulin Ltd v Registrar of the Land Registry* [1918] 1 Ch 202 at 209; and see Challis's Law of Real Property (3rd Edn) 180. As to the period of limitation see PARA 1012 post; and for the meaning of 'person in being' see PARA 1013 post. As to the ineffectiveness of subsequent events to render a limitation valid see PARA 1017 post.

3 As to the effect of invalid gifts over see PARA 1085 post; as to invalid directions for the settlement of valid gifts see PARA 1089 post; and as to directions not affecting vesting see PARA 1069 post.

4 See PARAS 1009, 1010 post.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(1) PERIOD ALLOWED FOR SUSPENSION OF VESTING/(ii) Instruments taking Effect on or after 16 July 1964/1009. The 'wait and see' rule.

(ii) Instruments taking Effect on or after 16 July 1964

1009. The 'wait and see' rule.

A disposition¹ to which the Perpetuities and Accumulations Act 1964 applies² which would be void on the ground that the interest disposed of might not become vested until too remote a time is to be treated, until such time, if any, as it becomes established that the vesting must occur, if at all, after the end of the perpetuity period³, as if the disposition were not subject to the rule against perpetuities⁴. Similarly, where a disposition consisting of the conferring of a general power of appointment⁵ would be void on the ground that the power might not become exercisable until too remote a time, the disposition is to be treated, until such time, if any, as it becomes established that the power will not be exercisable within the perpetuity period, as if the disposition were not subject to the rule against perpetuities⁶.

Where a disposition consisting of the conferring of any power, option or other right would be void on the ground that the right might be exercised at too remote a time, the disposition is to be treated as regards any exercise of the right within the perpetuity period as if it were not subject to the rule against perpetuities and is to be treated as void for remoteness only if, and so far as, the right is not fully exercised within that period⁷.

The mere possibility that an interest will vest outside the period is thus not fatal, and its being established that it must do so does not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise⁸.

1 For these purposes, 'disposition' includes the conferring of a power of appointment and any other disposition of an interest in or right over property; and references to the interest disposed of are to be construed accordingly: Perpetuities and Accumulations Act 1964 s 15 (2). 'Power of appointment' includes any discretionary power to transfer a beneficial interest in property without the furnishing of valuable consideration: s 15 (2). An arrangement for the variation of the trust may constitute a disposition for the purposes of ss 1 (1), 15 (2): see *Re Holt's Settlement, Wilson v Holt* [1969] 1 Ch 100 at 114, 115, [1968] 1 All ER 470 at 475, 476; *Re Lansdowne's Will Trusts, Marquis of Lansdowne v Earl of Shelburne* [1967] Ch 603 at 607. Cf *IRC v Holmden* [1968] AC 685 at 705, 712, [1968] 1 All ER 148 at 152, 153, 158, HL.

2 Subject to the Perpetuities and Accumulations Act 1964 s 8 (2) (trustees' administrative powers: see PARA 1034 note 12 post), the Act applies only in relation to instruments taking effect on or after 16 July 1964 (the commencement date of the Act), and, in the case of an instrument made in the exercise of a special power of appointment, applies only where the instrument creating the power takes effect on or after that date: s 15 (5). Section 7 (see PARA 1091 post) applies in all cases for construing the reference in s 15 (5) to a special power of appointment: s 15 (5) proviso. A court order under the Variation of Trusts Act 1958 approving a variation of trust constitutes an 'instrument' for the purposes of the Perpetuities and Accumulations Act 1964 s 15 (5), so that, where trusts created before 16 July 1964 are varied on or after that date, the provisions of the Act may apply: see *Re Holt's Settlement, Wilson v Holt* [1969] 1 Ch 100 at 109, 120, [1968] 1 All ER 470 at 472, 479. Cf *Re Lansdowne's Will Trusts, Marquis of Lansdowne v Earl of Shelburne* [1967] Ch 603 at 607. Where a disposition is effected otherwise than by an instrument, it is to be treated as though contained in an instrument taking effect when the disposition was made: see the Perpetuities and Accumulations Act 1964 s 15 (6) and *Re Thomas Meadows & Co Ltd and Subsidiary Companies (1960) Staff Pension Scheme Rules, Fetherston v Thomas Meadows & Co Ltd* [1971] Ch 278 at 284, [1971] 1 All ER 239 at 241, 242. The Perpetuities and Accumulations Act 1964 s 3 applies only to dispositions which would have been void under the law in force prior to 16 July 1964: see s 3 (1). The Law of Property Act 1925 s 163 (which saved gifts contingent on the beneficiary's attaining an age greater than 21 years) was not, however, repealed by the Perpetuities and Accumulations Act 1964 s 4 (6) except in relation to instruments taking effect on or after 16 July 1964. The inclusion of s 4 (6) repealing the Law of Property Act 1925 s 163 as a subsection of the Perpetuities and Accumulations Act 1964 s 4 was publicly acknowledged by the draftsman of that Act as a mistake: see (1976) 120 Sol Jo 498. The mistake

has been corrected by the Children Act 1975 s 108 (1) (a), Sch 3 para 43, which amends the Perpetuities and Accumulations Act 1964 by the addition of s 4 (7), which is expressed to be 'for the avoidance of doubt' and clearly seems to have retrospective effect.

3 The perpetuity period calculated in accordance with the provisions of the Perpetuities and Accumulations Act 1964: see further PARAS 1010, 1011 post. It seems clear that the statutory provisions relating to age reduction (see s 4 (as amended) and PARAS 1070, 1075 post) and to the death of a surviving spouse (see s 5 and PARA 1022 post) are not to be applied until it is established that the disposition cannot be saved merely by 'waiting and seeing' under s 3; and see Megarry and Wade's Law of Real Property (5th Edn) 249; Morris and Leach's Rule against Perpetuities (2nd Edn), 1964 Supplement 7.

4 Perpetuities and Accumulations Act 1964 s 3 (1).

5 Powers of appointment are to be classified as general or special by reference to *ibid* s 7: see s 15 (5) proviso and PARAS 1091, 1096 post.

6 *Ibid* s 3 (2).

7 *Ibid* s 3 (3). Thus, the disposition of part of an interest by the exercise of a power within the period will not be invalidated by a failure to exercise the power in regard to any other part of the subject matter to which the power relates within the perpetuity period.

8 *Ibid* s 3 (1).

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(1) PERIOD ALLOWED FOR SUSPENSION OF VESTING/(ii) Instruments taking Effect on or after 16 July 1964/1010. Duration of the perpetuity period under the Perpetuities and Accumulations Act 1964.

1010. Duration of the perpetuity period under the Perpetuities and Accumulations Act 1964.

Where the Perpetuities and Accumulations Act 1964 applies¹, it provides its own rules as to the duration of the perpetuity period. In certain situations the period is a fixed number of years², but otherwise it is determined by reference to the duration of a life or lives in being stipulated by the Act³.

Except for a disposition⁴ which purports to confer an option to acquire for valuable consideration any interest in land⁵, or the exercise of a special power of appointment⁶, where the instrument by which any disposition is made so provides, the perpetuity period applicable to the disposition under the rule against perpetuities, instead of being of any other duration, may be of a duration equal to such number of years not exceeding 80 as is specified⁷ in that behalf in the instrument⁸.

Although the power to specify an 80-year period does not have effect where the disposition is made in exercise of a special power of appointment, where such a period is specified in the instrument creating such a special power, the period applies in relation to any disposition under the special power as it applies in relation to the special power itself⁹, the period running from the date of the creation of the special power and not the date of its exercise.

1 See PARA 1009 note 2 ante.

2 Eg 21 years in the case of options to acquire any interest in land: see the Perpetuities and Accumulations Act 1964 s 9 (2) and PARA 1037 post.

3 See *ibid* s 3 (4), (5) and PARA 1011 post.

4 For the meaning of 'disposition' see PARA 1009 note 1 ante.

5 le where a fixed period of 21 years applies: see the Perpetuities and Accumulations Act 1964 s 9 (2) and PARA 1037 post.

6 For the meaning of 'power of appointment' see PARA 1009 note 1 ante. Powers of appointment exercised on or after 16 July 1964 must be classified in accordance with *ibid* s 7: see PARA 1009 note 5 ante.

7 'Specified' means 'unambiguously identified' or 'made clear': *Re Green's Will Trusts, Fitzgerald-Hart v A-G* [1985] 3 All ER 455 ('the period from the date of my death to 1 January 2020' held to be good). On the ground that the vesting must relate to the specified period one view is that in the case eg of a gift by will 'to the lineal issue of X I specify the period of 80 years as the perpetuity period applicable to this disposition' the disposition is void and the 'wait and see' rule applies, the period of waiting being the specified statutory period: see Cheshire and Burn's Modern Law of Real Property (14th Edn) 301; Maudsley's Modern Law of Perpetuities 114, 123, 124; Megarry and Wade's Law of Real Property (5th Edn) 253. For an alternative view see *The Rules against Perpetuities and Excessive Accumulations* (Law Com consultation paper no 133) p 12 n 40.

8 Perpetuities and Accumulations Act 1964 s 1 (1). Once so specified, no other period may be used: see s 1 (1). This provision never applies automatically to a disposition and the maximum period which can be specified under it is almost certain to be shorter than the period that can be obtained under a 'royal lives' clause. It must, however, be borne in mind that the end of a perpetuity period under a 'royal lives' clause, even if it is confined to the descendants of His late Majesty King George V, may be difficult to prove and that where, in the case of a will, the disposition may only take effect many years hence, it may even be difficult to ascertain all the relevant lives. Cf *Re Villar, Public Trustee v Villar* [1929] Ch 243, CA; *Re Leverhulme, Cooper v Leverhulme (No 2)* [1943] 2 All ER 274; and PARA 1014 note 11 post.

9 Perpetuities and Accumulations Act 1964 s 1 (2).

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2.
THE RULE AGAINST PERPETUITIES/(1) PERIOD ALLOWED FOR SUSPENSION OF VESTING/(ii)
Instruments taking Effect on or after 16 July 1964/1011. Period under the 'wait and see' rule.

1011. Period under the 'wait and see' rule.

Where the 'wait and see' rule applies and the period is not determined by reference to a period of years¹, it must be determined by reference to the lives of certain specified individuals² in being³ and ascertainable at the commencement of the perpetuity period and is determined by reference to their lives and no others⁴. These persons are as follows:

- 20 (1) the person or persons⁵ by whom the disposition⁶ was made⁷;
- 21 (2) a person to whom or in whose favour the disposition was made, that is to say:
 - 1 1. (a) in the case of a disposition to a class of persons, any member⁸ or potential member⁹ of the class¹⁰;
 2. (b) in the case of an individual disposition to a person taking only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied¹¹;
 3. (c) in the case of a special power of appointment¹² exercisable in favour of members of a class, any member or potential member of the class¹³;
 4. (d) in the case of a special power of appointment exercisable in favour of one person only, that person¹⁴ or, where the object of the power is ascertainable only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied¹⁵;
 5. (e) in the case of any power, option or other right¹⁶, the person on whom the right is conferred¹⁷;
- 2 22 (3) a person having a child or grandchild¹⁸ within heads (2)(a) to (d) above¹⁹, or any of whose children or grandchildren, if subsequently born, would by virtue of his or her descent²⁰ fall within those heads²¹;

- 23 (4) any person on the failure or determination of whose prior interest the disposition is limited to take effect²².

Where there are no such lives or they have to be disregarded²³, the perpetuity period is 21 years²⁴.

Where more than one disposition is involved, each one is to be considered separately for the purposes of determining which lives in being are applicable to it²⁵.

1 le a specified period not exceeding 80 years (see the Perpetuities and Accumulations Act 1964 s 1 and PARA 1010 ante) or a period of 21 years in relation to options to acquire an interest in land (see s 9 (2) and PARA 1037 post).

2 No other lives may be used and it is clear that only human lives are intended: see *ibid* s 3 (5) (cited *infra*). See also (1981) LQR 593.

3 For these purposes, 'in being' means living or en ventre sa mère: Perpetuities and Accumulations Act 1964 s 15 (2).

4 See *ibid* s 3 (4) (a). The lives of any description of persons falling within heads (2) or (3) *infra* must be disregarded if their number is such as to render it impracticable to ascertain the survivor's date of death: s 3 (4) (a); and see *Re Thomas Meadows & Co Ltd and Subsidiary Companies (1960) Staff Pension Scheme Rules, Fetherston v Thomas Meadows & Co Ltd* [1971] Ch 278 at 285, [1971] 1 All ER 239 at 242 (lives disregarded as impracticable to ascertain).

5 The singular includes the plural: see the Interpretation Act 1978 s 6 (c) and STATUTES vol 44(1) (Reissue) PARA 1388.

6 For the meaning of 'disposition' see PARA 1009 note 1 ante.

7 Perpetuities and Accumulations Act 1964 s 3 (5) (a).

8 For these purposes, a person is to be treated as a member of a class if in his case all the conditions identifying a member of the class are satisfied: *ibid* s 15 (3).

9 For these purposes, a person is to be treated as a potential member of a class if in his case some only of the conditions of membership of the class are satisfied but there is a possibility that the remainder will in time be satisfied: *ibid* s 15 (3). Potential members are thus treated as lives in being not only for the purpose of their own prospective interest but also that of others. For a critical view of this see (1964) 80 LQR 486 at 504.

10 Perpetuities and Accumulations Act 1964 s 3 (5) (b) (i). As to class gifts see PARA 1071 et seq post.

11 *Ibid* s 3 (5) (b) (ii).

12 For the meaning of 'power of appointment' see PARA 1009 note 1 ante. For the purposes of the Perpetuities and Accumulations Act 1964, powers are classified as special or general in accordance with s 7 (see PARA 1091 post): s 15 (5) proviso.

13 *Ibid* s 3 (5) (b) (iii).

14 This provision has been criticised as otiose: see (1964) 80 LQR 486 at 504.

15 Perpetuities and Accumulations Act 1964 s 3 (5) (b) (iv).

16 This may also cover duties: see Megarry and Wade's Law of Real Property (5th Edn) 281.

17 Perpetuities and Accumulations Act 1964 s 3 (5) (b) (v). The better view appears to be that the donee of a power, option or other right is a life in being not only for the purposes of the validity of the power itself but also for the purposes of the validity of its exercise: see Megarry and Wade's Law of Real Property (5th Edn) 281, 283. Cf Maudsley's Modern Law of Perpetuities 133-136.

18 This includes both paternal and maternal grandparents: see Cheshire and Burn's Modern Law of Real Property (14th Edn) 308.

19 le within the provisions of the Perpetuities and Accumulations Act 1964 s 3 (5) (b) (i)-(iv).

20 This refers to the beneficiary's genealogy. Thus in a gift 'to A's grandchildren', A having a married son B, B and his wife and her parents are measuring lives regardless of whether they already have children: see Maudsley's Modern Law of Perpetuities 132. Cf (1969) 27 Cambridge Law Journal 285, 286. It seems that divorced spouses qualify if they have borne children, but not otherwise: Maudsley's Modern Law of Perpetuities 133.

21 Perpetuities and Accumulations Act 1964 s 3 (5) (c).

22 Ibid s 3 (5) (d).

23 See note 4 supra.

24 Perpetuities and Accumulations Act 1964 s 3 (4) (b).

25 This seems clear from the wording of ibid s 3 (5) (b) (i)-(iv) ('in the case of ') and s 6 (see PARAS 1082, 1088 post). Thus in a bequest 'to A's first child to become a priest, but if A has no such child to B', A may be a measuring life for the purposes of the gift to his child under s 3 (5) (b) (ii), (c) (see heads (2) (b), (3) supra), but not for the purposes of the gift to B.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(1) PERIOD ALLOWED FOR SUSPENSION OF VESTING/(iii) Vesting of Interests; Persons in Being/1012. Period within which interest must vest.

(iii) Vesting of Interests; Persons in Being

1012. Period within which interest must vest.

Subject to certain exceptions¹, every future estate or interest in any kind of property the rights in which are governed by the law of England² must be such that, at the time when the instrument creating it comes into operation³, it can be predicated that, if the estate or interest vests at all, it must necessarily vest not later than at the end of a certain period⁴.

This period is the life of a person or the survivor of any number of persons⁵ in being at the time of creation of the future estate or interest, and ascertained for that purpose by the instrument creating the same, and 21 years to be computed from the dropping of the life⁶. If, however, no such person or persons are ascertained by the instrument, the period is 21 years computed from the time of creation of the future estate or interest⁷.

In this title this period is subsequently called 'the perpetuity period'⁸.

Under the Perpetuities and Accumulations Act 1964 the persons in being⁹ whose lives may be chosen are stipulated¹⁰. If no lives in being are available, the perpetuity period is 21 years¹¹. Where the disposition¹² purports to confer an option to acquire for valuable consideration any interest in land, the perpetuity period, when applicable, is 21 years¹³. In certain cases a period not exceeding 80 years may be specified in the instrument¹⁴ by which a disposition is made¹⁵.

Where the new 'wait and see' rule applies¹⁶, it is not necessary for a disposition to be such that the interest must vest if at all within the perpetuity period. Until it becomes established that the interest must vest outside the period, it is to be treated as valid for perpetuity purposes; it suffices that there is a possibility of its vesting within the period.

1 See PARA 1041 et seq post.

2 As to the property and interests bound by the rule see further PARA 1025 et seq post. Cf para 1125 post.

3 As regards dispositions by will, or in the execution of powers, and generally as to the circumstances taken into account, see PARA 1065 et seq post.

4 The vesting of an executory limitation was allowed to be suspended first for a life (*Pells v Brown* (1620) Cro Jac 590; *Duke of Norfolk's Case* (1683) 3 Cas in Ch 1), two lives (*Goring v Bickerstaff* (1662) 1 Cas in Ch 4), or any number of concurrent lives (*Low v Burron* (1734) 3 P Wms 262), a life and one year (*Lloyd v Carew* (1697) Show Parl Cas 137), or a reasonable time after the life (*Marks v Marks* (1718) 10 Mod Rep 419; *Goodtitle d Gurnall v Wood* (1740) 7 Term Rep 103n), or up to 21 years (*Stephens v Stephens* (1736) Cas temp Talb 228). A period of 21 years in gross, without reference to minority, is recognised in *Cadell v Palmer* (1833) 1 Cl & Fin 372 at 421, HL.

5 As to the qualifications necessary for the persons chosen see PARAS 1014-1016 post.

6 The period stated in the text is similar to the period stated in the Third Report of the Commissioners on the Law of Real Property (1832) 69, except that in that report there is stated as alternative to the 21 years the minority of some person en ventre sa mère at the dropping of the life, and ascertained for that purpose by the instrument. It seems that the correctness of this alternative still awaits judicial decision: see PARA 1015 note 4 post. The Law Reform Committee considered the adoption of some different period from that at present in force, and rejected the suggestion, except that no real disadvantage was seen in providing a fixed period (say 80 years) as an optional alternative: Fourth Report of the Law Reform Committee (1956) (Cmnd 18) PARAS 5-9. As to the implementation of the report see infra and PARA 1010 ante. See also *Re Drummond's Settlement*, *Foster v Foster* [1988] 1 All ER 449, [1988] 1 WLR 234, CA.

7 *Crooke v De Vandes* (1803) 9 Ves 197; *Palmer v Holford* (1828) 4 Russ 403; *Speakman v Speakman* (1850) 8 Hare 180; Lewis's Law of Perpetuity 172.

8 It is convenient to use this term, as reference is continually made to 'the period allowed by law for the vesting of executory interests'. The Third Report of the Commissioners on the Law of Real Property (1832) 37, 39 used the term 'the period of perpetuity'.

9 For the meaning of 'in being' see PARA 1011 note 3 ante.

10 See the Perpetuities and Accumulations Act 1964 s 3 (4), (5) and PARA 1011 ante.

11 See *ibid* s 3 (4) (b) and PARA 1011 ante.

12 For the meaning of 'disposition' see PARA 1009 note 1 ante.

13 See the Perpetuities and Accumulations Act 1964 s 9 (2) and PARA 1037 post.

14 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

15 See *ibid* s 1 (1) and PARA 1010 ante.

16 See *ibid* s 3 (1)-(3) and PARA 1009 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(1) PERIOD ALLOWED FOR SUSPENSION OF VESTING/(iii) Vesting of Interests; Persons in Being/1013. Meaning of 'person in being'.

1013. Meaning of 'person in being'.

A child who is en ventre sa mère at the time of creation of an estate or interest and is afterwards born alive is deemed to be a person in being for the purposes both of the vesting of the estate or interest in him¹, and of being a life chosen to form the perpetuity period². The perpetuity period may, therefore, be extended by a period or periods for gestation, but only in those cases where gestation actually exists³. This branch of the rule is applied whether it is for the advantage of the unborn child or not⁴.

For the purposes of the Perpetuities and Accumulations Act 1964 also a child en ventre sa mère is a person in being⁵.

1 *Thellusson v Woodford* (1805) 11 Ves 112 at 142, 143, HL (the judges' second answer); *Blackburn v Stables* (1814) 2 Ves & B 367; *Knapping v Tomlinson* (1864) 34 LJ Ch 3; *Villar v Gilbey* [1907] AC 139 at 149, HL, explained in *Elliot v Lord Joicey* [1935] AC 209 at 225 et seq, HL. The foundation of the rule has been said to be *Stephens v Stephens* (1736) Cas temp Talb 228, where an executory devise to such a son of a living person as should attain 21 was held valid, combined with 10 Will 3 c 22 (1698) (repealed), which provided that posthumous children should be able to take under limitations as if born in the lifetime of their parent: Lewis's Law of Perpetuity 147; and see Morris and Leach's Rule against Perpetuities (2nd Edn) 9.

2 *Thellusson v Woodford* (1805) 11 Ves 112 at 141, HL (the judges' first answer); *Long v Blackall* (1797) 7 Term Rep 100; *Re Wilmer's Trusts*, *Moore v Wingfield* [1903] 1 Ch 874 at 879 per Buckley J (affd [1903] 2 Ch 411 at 422, CA per Stirling LJ). See also *Burton v Islington Health Authority*, *de Martell v Merton and Sutton Health Authority* [1992] 3 All ER 833 at 839, [1992] 3 WLR 637 at 655, 656, CA per Dillon LJ.

3 *Cadell v Palmer* (1833) 1 Cl & Fin 372 at 421, 422, HL (the judge's second and third answers).

4 *Re Wilmer's Trusts*, *Moore v Wingfield* [1903] 1 Ch 874 at 888 per Buckley J; affd [1903] 2 Ch 411 at 421, CA per Romer LJ. See also *Re Stern*, *Bartlett v Stern* [1962] Ch 732 at 737, [1961] 3 All ER 1129 at 1132, where Russell J said that, for the purposes of the rule against perpetuities, conception is treated as equivalent to birth. Where the question is one of construction, not of perpetuity, a child en ventre sa mère will not be deemed to be already born unless that construction will secure a benefit to that child: *Villar v Gilbey* [1907] AC 139, HL, explained in *Elliot v Lord Joicey* [1935] AC 209 at 225 et seq, HL. This rule of construction is not confined to class gifts: see *Re Stern*, *Bartlett v Stern* supra.

5 For the meaning of 'in being' in the Perpetuities and Accumulations Act 1964 s 15 (2) see PARA 1011 note 3 ante. As to children produced by in vitro fertilisation or artificial insemination after the father's death see PARA 1026 post.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(1) PERIOD ALLOWED FOR SUSPENSION OF VESTING/(iv) Choice of Period Available/1014. Choice of lives.

(iv) Choice of Period Available

1014. Choice of lives.

The choice of persons whose lives are chosen for the purposes of the perpetuity period may be quite arbitrary¹.

It is not material that those persons take no interest in the property² or are not connected with the persons having an interest in it in any way³. There is no limit to their number⁴, provided that evidence will be available to determine when the survivor of the lives drops⁵.

The qualifications necessary are that they must all be persons⁶ who are or will necessarily⁷ be ascertainable and in existence, or in gestation⁸, at the time from which the instrument speaks⁹, so that their lives are running concurrently¹⁰, and that in effect there is but one life to consider, that of the person who outlives the others¹¹; and that they must be such that the determination of their lives must be capable of being proved without undue difficulty¹².

Where the persons chosen are not capable of ascertainment, the limitation, even if purporting to be confined within proper limits, is void for uncertainty¹³. The uncertainty must, however, be a present uncertainty and not merely the possibility of uncertainty arising in the future; the mere fact that members of a class might become unascertainable is not fatal¹⁴.

In a will the persons must be such as must necessarily be in being at the testator's death¹⁵.

In relation to instruments taking effect on or after 16 July 1964, the Perpetuities and Accumulations Act 1964, where applicable¹⁶, stipulates that only lives in being¹⁷ ascertainable at the commencement of the perpetuity period and falling into one of the categories of persons specified in the Act may be used¹⁸.

- 1 *Cadell v Palmer* (1833) 1 Cl & Fin 372, HL. See also the Third Report of the Commissioners on the Law of Real Property (1832) 38 (suggesting a legislative change in this respect); the Fourth Report of the Law Reform Committee (1956) (Cmnd 18) PARAS 6-8; Lewis's Law of Perpetuity 161.
- 2 *Cadell v Palmer* (1833) 1 Cl & Fin 372, HL. Cf *Proctor v Bishop of Bath and Wells* (1794) 2 Hy Bl 358; *Beard v Westcott* (1813) 5 Taunt 393; and see *Hopkins v Hopkins* (1738) 1 Atk 581 at 596 per Lord Hardwicke LC.
- 3 *Cadell v Palmer* (1833) 1 Cl & Fin 372, HL.
- 4 *Thellusson v Woodford* (1805) 11 Ves 112, HL. *Goring v Bickerstaff* (1662) 1 Cas in Ch 4 established this principle for two lives as to limitations in trust of a term. Cf *Lloyd v Carew* (1697) Show Parl Cas 137 (shifting uses). In *Cadell v Palmer* (1833) 1 Cl & Fin 372, HL, the lives were 28 in number; and in *Robinson v Hardcastle* (1786) 2 Bro CC 22 at 30, Lord Thurlow LC said that 'a man may appoint a hundred or a thousand trustees, and that the survivor of them shall appoint a life estate; that would be within the line of a perpetuity'.
- 5 *Thellusson v Woodford* (1805) 11 Ves 112 at 146, HL. See also *Re Villar, Public Trustee v Villar* [1929] 1 Ch 243, CA; *Re Leverhulme, Cooper v Leverhulme (No 2)* [1943] 2 All ER 274; followed in *Re Warren's Will Trusts, Barker-Carr v Warren* (1961) 105 Sol Jo 511; and see Morris and Leach's Rule against Perpetuities (2nd Edn) 60, 61.
- 6 In view of the origin of the rule, allowing a suspense during lives, it has usually been assumed that the lives must be those of human beings. Under the Perpetuities and Accumulations Act 1964 there seems no doubt that only human lives can be used: see PARA 1011 note 2 ante. If and in so far as *Re Dean, Cooper-Dean v Stevens* (1889) 41 ChD 552 decided that the lives of animals could be taken for the purpose, it is generally regarded as wrongly decided: see Gray's Rule against Perpetuities (4th Edn) s 896.3. Cf *Re Kelly, Cleary v James* [1932] IR 255 (cited in PARA 1005 note 8 ante).
- 7 *Gooch v Gooch* (1853) 3 De GM & G 366 at 385.
- 8 See PARA 1013 ante.
- 9 *Thellusson v Woodford* (1805) 11 Ves 112, HL; and see PARAS 1062-1064 post.
- 10 *Goring v Bickerstaff* (1662) Poll 31; *Love v Wyndham* (1669) 1 Mod Rep 50 at 54 per Twisden J; *Low v Burron* (1734) 3 P Wms 262 at 265 per Lord Talbot LC; *Gooch v Gooch* (1853) 3 De GM & G 366 at 384 per Lord Cranworth LC.
- 11 'Let the lives be never so many, there must be a survivor, and so it is but the length of that life': *Scatterwood v Edge* (1697) 1 Salk 229 per Powell J. 'The length of time depends not on the number but on the nature of the lives': *Thellusson v Woodford* (1805) 11 Ves 112 at 145, HL per Lord Eldon LC. Accordingly the following large classes of persons have been suggested as validly chosen: all the members of one of the Houses of Parliament (*Thellusson v Woodford* supra at 146 per Lord Eldon LC); the boys of a named charity or public school (*Pownall v Graham* (1863) 33 Beav 242 at 246, 247 per Romilly MR; and see the Third Report of the Commissioners on the Law of Real Property (1832) 38); all Her Majesty's soldiers at the time (Lewis's Law of Perpetuity 167); all persons actually existing capable of succeeding to a named dignity (*Bankes v Baroness le Despencer* (1840) 10 Sim 576; and see *Re Viscount Exmouth, Viscount Exmouth v Praed* (1883) 23 ChD 158); all the living descendants of a named king or queen of the United Kingdom (see *Re Villar, Public Trustee v Villar* [1929] 1 Ch 243, CA (descendants of Queen Victoria; trust valid), followed in *Re Leverhulme, Cooper v Leverhulme (No 2)* [1943] 2 All ER 274). Despite the warning note sounded in *Re Leverhulme, Cooper v Leverhulme (No 2)* supra, a similar clause was upheld in *Re Warren's Will Trusts, Barker-Carr v Warren* (1961) 105 Sol Jo 511, and in *Re Dodwell & Co Ltd's Trust, Baker v Timmins* [1979] Ch 301; sub nom *Re Dodwell & Co Ltd's Trust Deed* [1978] 3 All ER 738 a clause specifying the issue of King George V was said undoubtedly to be good; and see Forms and Precedents; and Hallett's Conveyancing Precedents 771. See also the Fourth Report of the Law Reform Committee (1956) (Cmnd 18) PARAS 6-8 and PARA 1010 note 8 ante.
- 12 *Thellusson v Woodford* (1805) 11 Ves 112 at 136, 146, HL. See also the text and note 5 supra.
- 13 *Re Viscount Exmouth, Viscount Exmouth v Praed* (1883) 23 ChD 158 (all the persons in existence at testator's death and afterwards attaining the title); *Re Moore, Prior v Moore* [1901] 1 Ch 936 (all persons living at testatrix's death); *Re Denley's Trust Deed, Holman v H H Martyn & Co Ltd* [1969] 1 Ch 373 at 383, [1968] 3 All ER 65 at 69; and see *Pownall v Graham* (1863) 33 Beav 242.
- 14 See *Muir v IRC* [1966] 1 All ER 295, [1966] 1 WLR 251; affd on this point [1966] 3 All ER 38 at 44, 45, [1966] 1 WLR 1269 at 1282, CA; distinguishing *Re Moore, Prior v Moore* [1901] 1 Ch 936.
- 15 *Gooch v Gooch* (1853) 3 De GM & G 366 at 385 (testator's daughter's children, not necessarily born in his lifetime); *Re Backhouse, Findlay v Backhouse* [1921] 2 Ch 51 (successive gifts to grandchildren). In accordance

with the rule (see PARA 1013 ante) they may be children en ventre sa mère at his death: *Thellusson v Woodford* (1805) 11 Ves 112, HL.

16 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

17 For the meaning of 'in being' see PARA 1011 note 3 ante.

18 Perpetuities and Accumulations Act 1964 s 3 (4), (5); and see PARA 1011 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(1) PERIOD ALLOWED FOR SUSPENSION OF VESTING/(iv) Choice of Period Available/1015. The twenty-one year period.

1015. The twenty-one year period.

The period of 21 years is a period in gross, without necessary reference to the minority of anyone¹. It may be denoted by the minority of any person, who may be the person in whom the interest is to vest (as in the case of an interest vesting on the majority of the alienee)² or may be any other person, whether taking an interest in the property³ or not⁴.

The period is not an absolute period of 21 years and nine months; the addition of a period for gestation is allowed only where gestation exists at the end of the 21-year period⁵.

1 *Cadell v Palmer* (1833) 1 Cl & Fin 372, HL; Lewis's Law of Perpetuity 160. The age of majority was reduced to 18 years with effect from 1 January 1970 by the Family Law Reform Act 1969 s 1: see PARA 1121 note 12 post.

2 *Taylor d Smith v Biddall* (1677) 2 Mod Rep 289 (doubted on another point in *Lord Dungannon v Smith* (1845) 12 Cl & Fin 546 at 580, 598, 608, 616-619, 627, 632, HL); *Stephens v Stephens* (1736) Cas temp Talb 228; and see *Pawlet v Dogget* (1688) 2 Vern 86; *Martin v Long* (1690) 2 Vern 151; *Thrustout d Small v Denny* (1750) 1 Wils 270. As to the validity on other grounds of the appointment considered in *Thrustout d Small v Denny* supra cf *Doe d Brownsmith v Denny* (1756) 1 Keny 280; *Roe d Buxton v Dunt* (1767) 2 Wils 336 at 337-339.

3 *Massenburgh v Ash* (1684) 1 Vern 234, 304; *Maddox v Staines* (1727) 2 P Wms 421 (affd sub nom *Staines v Maddock* (1728) 3 Bro Parl Cas 108, HL); *Gulliver v Wickett* (1745) 1 Wils 105.

4 *Beard v Westcott* (1813) 5 Taunt 393 (where the person took an interest void under the rule). Thus vesting may take place when the unborn child of a living person attains majority (*Packer v Scott* (1864) 33 Beav 511 at 512, 513 per Romilly MR), and the period prescribed by a will may extend until the testator's youngest grandchild attains 21 (*Shaw v Rhodes* (1835) 1 My & Cr 135 at 154 per Bosanquet J). The inference has been drawn that such a person may be a child en ventre sa mère at the commencement of the 21 years (see the Third Report of the Commissioners on the Law of Real Property (1832) 39, 69 and PARA 1012 note 6 ante), and that there may be three periods of gestation, that of the living person, of his child who is to attain 21 and of the alienee. The question arose, but was not decided, in *Smith v Farr* (1839) 3 Y & C Ex 328. See the opinions expressed in Lewis's Law of Perpetuity 726-728 and Supplement 22; Gray's Rule against Perpetuities (4th Edn) s 222; and see Morris and Leach's Rule against Perpetuities (2nd Edn) 65. There may be, at all events, two such periods of gestation.

5 *Cadell v Palmer* (1833) 1 Cl & Fin 372, HL.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(1) PERIOD ALLOWED FOR SUSPENSION OF VESTING/(iv) Choice of Period Available/1016. Period where no lives are chosen.

1016. Period where no lives are chosen.

The exact period of 21 years is the full extent of the perpetuity period in all cases where no life is indicated for the purpose, or where every life indicated has predeceased the testator.

Accordingly, limitations vesting in persons possibly unborn at the end of a specific number of years, more than 21 years from the date from which the instrument creating them operates, are invalid¹. In certain cases where terms of years exceeding 21 years were settled in trusts for persons in succession whose interests under the trusts were valid with respect to the rule, provisions for recouping the beneficiaries in each case, at the end of the term, out of other property for the capital value lost by not selling the term of years have, however, been held to be outside the enactment imposing restrictions on the accumulation of income² and treated as valid³, on the basis that they went no further than a prudent owner would go in the management of the property⁴.

Where the Perpetuity and Accumulations Act 1964 applies⁵, the perpetuity period is also 21 years if there is no available life in being⁶, unless some other period of years not exceeding 80 has been specified⁷.

1 *Palmer v Holford* (1828) 4 Russ 403; *Speakman v Speakman* (1850) 8 Hare 180; and see *Crooke v De Vandes* (1805) 11 Ves 330; *Baker v Stuart* (1897) 28 OR 439. In *Lachlan v Reynolds* (1852) 9 Hare 796, the gift was, on the construction adopted, restricted to lives in being.

2 See the Law of Property Act 1925 s 164 (replacing the Accumulations Act 1800 (repealed)) and PARA 1119 et seq post.

3 *Re Gardiner, Gardiner v Smith* [1901] 1 Ch 697 (provision for keeping insurance policy on foot); *Re Hurlbatt, Hurlbatt v Hurlbatt* [1910] 2 Ch 553 (provision for a reserve fund); and see *Wood v Drew* (1864) 33 Beav 610 (cited in PARA 1020 note 2 post). In *Re Daveron, Bowen v Churchill* [1893] 3 Ch 421, although a trust for sale arising at the expiration of a lease with 49 years unexpired was void under the rule, the persons who were intended to take the proceeds of sale and were themselves within the rule were held to be entitled. See also *English v Cliff* [1914] 2 Ch 376 (trust for sale arising simultaneously with the termination of the 21-year term).

4 See *Re Rochford's Settlement Trusts, Rochford v Rochford* [1965] Ch 111 at 124, [1964] 2 All ER 177 at 183 per Cross J.

5 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

6 *Ibid* s 3 (4) (b); and see PARA 1011 ante.

7 *Ibid* under *ibid* s 1: see PARA 1010 ante. Section 1 does not, however, apply to options relating to land: see s 9 (2) and PARA 1037 post.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(1) PERIOD ALLOWED FOR SUSPENSION OF VESTING/(iv) Choice of Period Available/1017. Ineffectiveness of subsequent events to validate limitation.

1017. Ineffectiveness of subsequent events to validate limitation.

Any estate or interest which does not necessarily satisfy the rule against perpetuities¹ is void from its creation², and events subsequent to the date of the instrument which, or subsequent to the death of the testator whose will, created the estate or interest, which in fact make the vesting take place within the perpetuity period, have no effect so as to make the estate or interest valid³. In relation to instruments taking effect on or after 16 July 1964⁴, a limitation may, however, be treated as valid if there is a possibility that the interest will vest within the perpetuity period; under the 'wait and see' rule⁵ a disposition⁶ is treated as valid for perpetuity

purposes until such time, if any, as it becomes established that the interest must vest, if vest at all, outside the period⁷.

1 le the rule set out in PARA 1008 ante.

2 This is properly a corollary from the rule stated in PARA 1012 ante, but for completeness it is convenient to state it as a co-ordinate separate rule: see *Lord Dungannon v Smith* (1845) 12 Cl & Fin 546 at 612, HL per Tindal CJ; Lewis's Law of Perpetuity 170.

The estate is not void only for the excess, even where the excess could be clearly ascertained (*Hancock v Watson* [1902] AC 14 at 22, HL, approving *Leak v Robinson* (1817) 2 Mer 363 at 389); and see the Third Report of the Commissioners of the Law of Real Property (1832) 35. In respect of an instrument executed or a will coming into operation after 31 December 1925 the age of 21 years will be substituted in some cases for an age exceeding 21 years, if the greater age would infringe the rule against perpetuities: see the Law of Property Act 1925 s 163 (repealed in relation to instruments taking effect on or after 16 July 1964: see PARA 1009 note 2 ante).

3 *Jee v Audley* (1787) 1 Cox Eq Cas 324 at 326 per Kenyon MR. See also *Lord Southampton v Marquis of Hertford* (1813) 2 Ves & B 54; *Lord Dungannon v Smith* (1845) 12 Cl & Fin 546, HL; *Harding v Nott* (1857) 7 E & B 650. As to the circumstances taken into account see further PARAS 1065, 1066 post. The adoption of a 'wait and see' rule was recommended by the Fourth Report of the Law Reform Committee (1956) (Cmd 18) PARAS 17-23. As to its implementation see infra and PARA 1009 ante.

4 le the commencement date of the Perpetuities and Accumulations Act 1964.

5 See PARA 1009 ante.

6 For the meaning of 'disposition' see PARA 1009 note 1 ante.

7 See the Perpetuities and Accumulations Act 1964 s 3 (1) and PARA 1009 ante; cf *Re Watson's Settlement Trusts*, *Dawson v Reid* [1959] 2 All ER 676 at 681, [1959] 1 WLR 732 at 739.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(1) PERIOD ALLOWED FOR SUSPENSION OF VESTING/(iv) Choice of Period Available/1018. Time of creation of estate or interest.

1018. Time of creation of estate or interest.

The time of the testator's death is deemed to be the time of creation of an estate or interest created by will¹; and the time of the execution of the instrument creating the power is deemed to be the time of creation of an estate or interest created by the execution of a power not tantamount to absolute ownership².

1 For these purposes, a disposition contained in a will is deemed to be made at the testator's death: Perpetuities and Accumulations Act 1964 s 15 (2). 'Will' includes a codicil: s 15 (2). For the meaning of 'disposition' see PARA 1009 note 1 ante.

2 See PARAS 1062-1064 post. As to special powers see PARA 1097 et seq post. See also the Third Report of the Commissioners on the Law of Real Property (1832) 40, 69.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(1) PERIOD ALLOWED FOR SUSPENSION OF VESTING/(v) Determination of Time of Vesting/1019. Vesting.

(v) Determination of Time of Vesting

1019. Vesting.

An estate or interest is or becomes vested¹ when:

- 24 (1) the person or persons, corporation or body to whom or to which it is limited is or are ascertained and in existence and capable of being an alienee²;
- 25 (2) the quantum³ of the estate and interest is ascertained; and
- 26 (3) all other events have happened to enable the estate or interest to come into possession at once,

subject to the determination at any time of the prior estates and interests.

1 As to vested and contingent interests generally see REAL PROPERTY vol 39(2) (Reissue) PARA 166. See also *Re Barbre's Settlement* (1916) 85 LJ Ch 683; *Re Seely, Langton v Langton* (1920) 149 LT Jo 462; 2 Fearne's Contingent Remainders (10th Edn) [62], [63]. Gray's Rule against Perpetuities (4th Edn) s 118 observes that the rule does not concern itself with the secondary meaning of 'transmissible' sometimes given to the word 'vested'. A limitation by reference to the former statutes of distribution may fail, as a perpetuity, owing to the postponement by the Administration of Estates Act 1925 s 47 (1) (i) of the time of vesting under the statutory trusts for the issue of an intestate until the attainment of the age of 21 years or earlier marriage: *Re Hart's Will Trust, Public Trustee v Barclays Bank Ltd* [1950] Ch 84, [1949] 2 All ER 898. In relation to deaths on or after 1 January 1970, 18 years is, however, substituted for 21 years in the Administration of Estates Act 1925 s 47 (1) (i): s 47 (1) (i) (amended by the Family Law Reform Act 1969 s 3 (2)). As to the statutory trusts for issue see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 603-608.

2 The alienee himself may be under disabilities, which are ignored in questions of perpetuity: *Re Earl of Stamford and Warrington, Payne v Grey* [1912] 1 Ch 343 at 355, CA per Cozens-Hardy MR. See also *Ferrand v Wilson* (1845) 4 Hare 344 at 374 per Wigram V-C.

3 The fact that the amount or value of quantum may be varied or fluctuate outside the perpetuity period is immaterial: see *Beachway Management Ltd v Wisewell* [1971] Ch 610, [1971] 1 All ER 1 (fluctuating rentcharge), following *Re Cassel, Public Trustee v Mountbatten* [1926] Ch 358; and see PARA 1020 post.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(1) PERIOD ALLOWED FOR SUSPENSION OF VESTING/(v) Determination of Time of Vesting/1020. Quantum of interest.

1020. Quantum of interest.

Where the extent of the alienee's interest may possibly not be ascertainable until after the perpetuity period, the limitation is void¹.

The quantum of interest may be validly ascertained by reference to any property existing at the date of the creation of the limitation or to the value of such property².

Where the Perpetuities and Accumulations Act 1964 applies³, the limitation will be treated as valid until such time as it becomes established that the extent of the interest cannot be ascertained within the perpetuity period⁴.

1 *Curtis v Lukin* (1842) 5 Beav 147 at 154, 156; *Redington v Browne* (1893) 32 LR Ir 347 at 356, 357; *Savill Bros Ltd v Bethell* [1902] 2 Ch 523, CA; *Re Thompson, Thompson v Thompson* [1906] 2 Ch 199 at 202 per Joyce J. As to limitations to classes of persons see PARA 1071 et seq post.

2 *Wood v Drew* (1864) 33 Beav 610; but see Gray's Rule against Perpetuities (4th Edn) s 205 note (1). Cf *Re Wood, Tullett v Colville* [1894] 2 Ch 310 at 316 (affd [1894] 3 Ch 381 at 384, CA); *Re Coulson's Trusts, Pritchard v Coulson* (1907) 97 LT 754; and see *Re Hurlbatt, Hurlbatt v Hurlbatt* [1910] 2 Ch 553 at 559. The uncertainty of the quantum of an annual sum does not render a disposition void if the interest in question and the property

subject to it vest within the legal period and the quantum is capable of being rendered certain: *Re Cassel, Public Trustee v Mountbatten* [1926] Ch 358; and see *Beachway Management Ltd v Wisewell* [1971] Ch 610 at 616, [1971] 1 All ER 1 at 4, 5, following *Re Cassel, Public Trustee v Mountbatten* supra. Cf Morris and Leach's Rule against Perpetuities (2nd Edn) 100. See also *Re Johnson's Settlement Trusts, McClure v Johnson* [1943] Ch 341, [1943] 2 All ER 499.

3 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

4 See *ibid* s 3 (1) and PARA 1009 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(1) PERIOD ALLOWED FOR SUSPENSION OF VESTING/(v) Determination of Time of Vesting/1021. Accumulated property.

1021. Accumulated property.

Where the property is to be increased by accumulation, it is sufficient if within the perpetuity period there is a person in existence entitled to take the property, whatever its value or amount¹, that is to say if the limitation is vested and in possession in other respects².

Where, however, the direction for accumulation forms a condition precedent to the alienee's interest, and that accumulation may extend beyond the legal limits and cannot be stopped and the fund disposed of by the alienee, the direction is void³.

In so far as the cessation of accumulation forms a condition precedent to the vesting of an interest, the 'wait and see' provisions of the Perpetuities and Accumulations Act 1964⁴ may save the disposition, it being treated as valid for the purposes of the rule against perpetuities until such time, if any, as it becomes established that the accumulation must continue beyond the perpetuity period.

1 *Oddie v Brown* (1859) 4 De G & J 179; cf *Re Swain, Monckton v Hands* [1905] 1 Ch 669, CA.

2 In *Pearson v IRC* [1981] AC 753, [1980] 2 All ER 479, HL, it was held (Lord Salmon and Lord Russell of Killowen dissenting) that the existence of a power to accumulate prevented an interest from being 'in possession' for capital transfer tax purposes.

3 As to accumulation see PARA 1119 et seq post; *Curtis v Lukin* (1842) 5 Beav 147; *Smith v Cuninghame* (1884) 13 LR Ir 480. Cf *Trustees, Executors and Agency Co Ltd v Bush* (1908) 28 NZLR 117; *Girard Trust Co v Russell* 179 F 446 (US 1910).

4 Ie the Perpetuities and Accumulations Act 1964 s 3 (1)-(3): see PARA 1009 ante. It is doubtful whether the 'wait and see' principle is available in respect of trusts (or powers) for accumulation as such. The 1964 Act is not in terms made applicable to accumulations. For comments on the point see Maudsley's Modern Law of Perpetuities 207; Megarry and Wade's Law of Real Property (5th Edn) 304, 305.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(1) PERIOD ALLOWED FOR SUSPENSION OF VESTING/(v) Determination of Time of Vesting/1022. Remoteness in description of alienee or in contingent events.

1022. Remoteness in description of alienee or in contingent events.

Assuming the limitation is valid as regards the quantum of interest limited, it may be invalid on either of two grounds¹:

- 27 (1) that the description of the alienee is such that he may not necessarily be in existence and ascertainable within the perpetuity period²; or
- 28 (2) that, apart from the description of the alienee (who may be a living person in this case)³, the events which must happen in order to render the estate or interest ready to come into possession at once, subject to the determination of prior estates and interests, are such that they may not necessarily happen within the perpetuity period⁴.

The question of uncertainty must be kept distinct from the question of remoteness; for the purpose of testing the question of remoteness, the uncertainty of the alienee existing at all⁵, or the uncertainty of the other events on which the limitation is contingent happening at all, is immaterial. If existing at all, the alienee must of necessity be ascertained, and, if happening at all, the events must be such as will, of necessity, happen within the perpetuity period⁶.

In relation to a disposition⁷ to which the Perpetuities and Accumulations Act 1964 applies⁸, the mere fact that the alienee may not be ascertained or that the contingency may not occur within the perpetuity period is not fatal. Under the 'wait and see' provisions of the Act⁹, the disposition is treated as valid until such time, if any, as it becomes established that the alienee must be ascertained or the contingency must occur outside the perpetuity period.

Furthermore, where a disposition is limited by reference to the time of death of the survivor of a person in being¹⁰ at the commencement of the perpetuity period and any spouse of that person, and that time has not arrived at the end of the perpetuity period, the disposition is treated for all purposes (where to do so would save it from being void for remoteness) as if it had instead been limited by reference to the time immediately before the end of the perpetuity period¹¹.

1 See the Fourth Report of the Law Reform Committee (1956) (Cmnd 18) PARAS 17-23, where a 'wait and see' rule was suggested. As to the implementation of this suggestion see *infra* and PARA 1009 *ante*.

2 *Proctor v Bishop of Bath and Wells* (1794) 2 Hy Bl 358 (the first son of a living person who had no son, that should be bred a clergyman); *Tregonwell v Sydenham* (1815) 3 Dow 194; *Lady Tollemache v Earl and Countess of Coventry* (1834) 2 Cl & Fin 611, HL. Cf *Bacon v Proctor* (1822) Turn & R 31; *Mackworth v Hinxman* (1836) 2 Keen 658; and see *Ker v Lord Dungannon* (1841) 1 Dr & War 509 (affd sub nom *Lord Dungannon v Smith* (1845) 12 Cl & Fin 546, HL); Sugden's Law of Property 330; *Ibbetson v Ibbetson* (1840) 5 My & Cr 26; *Wainman v Field* (1854) Kay 507; *Re Gage, Hill v Gage* [1898] 1 Ch 498; Third Report of the Commissioners on the Law of Real Property (1832) 40; Lewis's Law of Perpetuity 464. The description of the alienee (not being a living person) may require him to survive a particular event or to be ascertained at the death of a particular person or class of persons, and the limitation is accordingly invalid if the event will not necessarily happen within the perpetuity period (*Jee v Audley* (1787) 1 Cox Eq Cas 324; *Gooding v Read* (1853) 4 De GM & G 510; *Re Bowles, Page v Page* [1905] 1 Ch 371), or if the person at whose death the alienee is to be ascertained is unborn, or possibly unborn (*Hodson v Ball* (1845) 14 Sim 558; *Gooch v Gooch* (1853) 3 De GM & G 366; *Lett v Randall, Lett v Dormer* (1855) 3 Sm & G 83; *Courtier v Oram* (1855) 21 Beav 91; *Buchanan v Harrison* (1861) 1 John & H 662; *Re Taylor's Trusts, Taylor v Blake* [1912] 1 IR 1; *Re Bowles, Page v Page* *supra*). Thus the survivor of a class comprising unborn persons cannot be a direct alienee: see PARA 1067 *post*. The limitation is, however, valid where all the persons are alive or en ventre sa mère at the death of the survivor of whom the alienee is ascertained: *Long v Blackall* (1797) 7 Term Rep 100; *Thellusson v Woodford* (1805) 11 Ves 112, HL; *Re Roberts, Repington v Roberts-Gawen* (1881) 19 ChD 520, CA; and see *Re Hargreaves, Midgley v Tatley* (1889) 43 ChD 401, CA. See also *Re Petrie, Lloyds Bank Ltd v Royal National Institute for the Blind* [1962] Ch 355, [1961] 3 All ER 1067, CA (legatee to be ascertained at time of realisation of residuary estate; this meant the date when the shares of residue should be receivable or receivable at law on completion of administration or expiration of the executor's year, whichever should first happen); *Re Atkin's Will Trusts, National Westminster Bank Ltd v Atkins* [1974] 2 All ER 1, [1974] 1 WLR 761 (devise in will of life interest in farm followed by direction to sell, with no power to postpone sale, followed by direction for division of the proceeds amongst a class of beneficiaries living at the completion of the sale held valid); and see PARA 1034 *post*.

3 *Proctor v Bishop of Bath and Wells* (1794) 2 Hy Bl 358; *Re Brown and Sibby's Contract* (1876) 3 ChD 156; *Re Hargreaves, Midgley v Tatley* (1889) 43 ChD 401, CA, overruling *Avern v Lloyd* (1868) LR 5 Eq 383. See also *Kirkby v Phillips* [1948] Ch 109, [1947] 2 All ER 777.

4 *Proctor v Bishop of Bath and Wells* (1974) 2 Hy Bl 358 (if A should have no son bred a clergyman); *Cambridge v Rous* (1802) 8 Ves 12 at 24, 25; *Chamberlayne v Brockett* (1872) 8 Ch App 206 at 212 per Lord Selbourne LC (applied in *Re Wightwick's Will Trusts, Official Trustees of Charitable Funds v Fielding-Ould* [1950] Ch 260, [1950] 1 All ER 689); *London and South Western Rly Co v Gomm* (1882) 20 ChD 562, CA; *Tyrell v Naylor* (1892) 11 NZLR 118; *Re Bowen, Lloyd Phillips v Davis* [1893] 2 Ch 491; *Re Lord Stratheden and Campbell, Alt v Lord Stratheden and Campbell* [1894] 3 Ch 265 (followed in *Re Mander, Westminster Bank Ltd v Mander* [1950] Ch 547, [1950] 2 All ER 191); *Re Wood, Tullet v Colville* [1894] 3 Ch 381, CA; *Re Kingham, Kingham v Kingham* [1897] 1 IR 170; *Thomas v Thomas* (1902) 87 LT 58, CA; *Edwards v Edwards* [1909] AC 275, HL; *Re Bewick, Ryle v Ryle* [1911] 1 Ch 116; *Re Whiteford, Whiteford v Whiteford* [1915] 1 Ch 347 (distinguished in *Beachway Management Ltd v Wisewell* [1971] Ch 610, [1971] 1 All ER 1); *Re Peel's Release* [1921] 2 Ch 218 (followed in *Re Talbot, Jubb v Sheard* [1933] Ch 895); *Re Engels, National Provincial Bank Ltd v Mayer* [1943] 1 All ER 506; *Re Johnson's Settlement Trusts, McClure v Johnson* [1943] Ch 341, [1943] 2 All ER 499; *Re Jones, Midland Bank Executor and Trustee Co Ltd v League of Welldoers* [1950] 2 All ER 239.

5 *Thellusson v Woodford* (1799) 4 Ves 227 at 309; Lewis's Law of Perpetuity 173. For the purpose of testing whether a limitation violates the rule, it may be assumed that the alienee is certain or capable of being ascertained: *Smithwick v Hayden* (1887) 19 LR Ir 490 at 495, Ir CA per FitzGibbon LJ.

6 *Cadell v Palmer* (1833) 1 Cl & Fin 372, HL. See also *Re Watson's Settlement Trusts, Dawson v Reid* [1959] 2 All ER 676 at 681, [1959] 1 WLR 732 at 739.

7 For the meaning of 'disposition' see PARA 1009 note 1 ante.

8 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

9 *le ibid* s 3 (1)-(3): see PARA 1009 ante.

10 For the meaning of 'in being' see PARA 1011 note 3 ante.

11 Perpetuities and Accumulations Act 1964 s 5. At common law, in a devise to 'X for life; remainder to the child of any woman he may marry contingently on the child surviving them both', the remainder to the child was void because of the possibility of X marrying a woman not alive at the date of the testator's death (and therefore not a relevant life in being) who might survive him for more than 21 years. The effect of s 5 and the 'wait and see' provisions is that, if the wife in fact survives X for more than 21 years, the disposition is treated as if substituted within it were a provision providing for the gift to vest immediately before the expiry of 21 years from X's death: see further Megarry and Wade's Law of Real Property (5th Edn) 244, 245, 260; Maudsley's Modern Law of Perpetuities 146-148; Morris and Leach's Rule against Perpetuities (2nd Edn) 72, 73 and 1964 Supplement 12, 13.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(1) PERIOD ALLOWED FOR SUSPENSION OF VESTING/(v) Determination of Time of Vesting/1023. Effect of rule on construction.

1023. Effect of rule on construction.

The validity of every limitation depends on the time of vesting, which is a matter to be decided on the construction of the words used¹. If the words of the instrument are plain, they are taken and their meaning arrived at² exactly in the same manner as if there had been no law of remoteness, and as if the whole intention expressed by the words could lawfully take effect³, without regard to the consequences⁴.

Words cannot be struck out because they offend against the rule⁵; but the meaning of words which apparently create a remote limitation may be controlled by other parts of the instrument, so that, taking the instrument as a whole, the limitation is valid⁶.

1 The question of the validity of a limitation may therefore be brought before the court on originating summons: see RSC Ord 5 r 4; Ord 85 r 2 and CIVIL PROCEDURE. Although the Rules of the Supreme Court 1883 Ord 54A r 1 was revoked in 1962 and not replaced, the originating summons remains an appropriate way of raising questions of construction: see the Supreme Court Practice 1993 para 7/1-7/3; and *Re Hargreaves, Midgley v Tatley* (1889) 43 ChD 401, CA. See also *Punton v Ministry of Pensions and National Insurance* [1963] 1 All ER

275, [1963] 1 WLR 186, CA; *Punton v Ministry of Pensions and National Insurance (No 2)* [1964] 1 All ER 448, [1964] 1 WLR 226, CA. As to the county court's jurisdiction in equity proceedings see COURTS vol 10 (Reissue) PARA 719.

2 As to the construction of deeds and wills see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 164 et seq; WILLS vol 50 (2005 Reissue) PARA 476 et seq.

3 *Lord Dungannon v Smith* (1845) 12 Cl & Fin 546 at 588, 599, HL; *Cattlin v Brown* (1853) 11 Hare 372 at 375 (second rule); *Stuart v Cockerell* (1870) 5 Ch App 713; *Pearks v Moseley, Re Moseley's Trusts* (1880) 5 App Cas 714 at 719, HL per Lord Selborne LC; *Hutchinson v Tottenham* [1898] 1 IR 403 at 418; *Re Wrightson, Battie-Wrightson v Thomas* [1904] 2 Ch 95 at 106, CA; *Edwards v Edwards* [1909] AC 275 at 277, HL; *Re Hume, Public Trustee v Mabey* [1912] 1 Ch 693.

4 *Speakman v Speakman* (1850) 8 Hare 180 at 185; *Pearks v Moseley, Re Moseley's Trusts* (1880) 5 App Cas 714, HL; *Re Mervin, Mervin v Crossman* [1891] 3 Ch 197; *Whitby v Von Luedecke* [1906] 1 Ch 783 at 788; *Re Earl of Stamford and Warrington, Payne v Grey* [1912] 1 Ch 343 at 365, CA; and see *Boughton v Boughton, Boughton v James* (1848) 1 HL Cas 406; *Re Ramadge's Settlement, Hamilton v Ramadge* [1919] 1 IR 205 (relation back to prior instrument). Even where a limited and restricted construction of the instrument would have the effect of supporting provisions otherwise wholly bad, and even where there is an executory trust, the court will not depart from the proper and ordinary meaning and sense of words as they have been used: *Boughton v James* (1844) 1 Coll 26 at 43 per Knight-Bruce V-C.

5 *Heasman v Pearse* (1871) 7 Ch App 275 at 283. Similarly, a gift cannot be split into gifts on several contingencies, unless so expressed: see PARA 1084 post.

6 Thus a limitation over in itself void may be controlled by the prior provisions of the instrument: *Trickey v Trickey* (1832) 3 My & K 560; *Ellicombe v Gompertz* (1837) 3 My & Cr 127. A limitation apparently on general failure of issue may be thus confined to a failure of issue previously mentioned: *Blackborn v Edgley* (1719) 1 P Wms 600 at 606; *Morse v Marquis of Ormonde* (1820) 5 Madd 99 (affd (1826) 1 Russ 382); *Malcolm v Taylor* (1832) 2 Russ & M 416 at 421; *Eno v Eno* (1847) 6 Hare 171; *Lewis v Templer* (1864) 33 Beav 625; Lewis's Law of Perpetuity 373. As to void limitations on failure of issue see PARA 1024 note 2 post.

UPDATE

1023 Effect of rule on construction

TEXT AND NOTE 1--RSC replaced by the Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(1) PERIOD ALLOWED FOR SUSPENSION OF VESTING/(v) Determination of Time of Vesting/1024. Intention effectuated.

1024. Intention effectuated.

In dealing with words which are obscure and ambiguous, weight may be given to the consideration that it is better to effectuate than to destroy the intention¹, which it is to be assumed was not meant to transgress the law².

Thus, there may be a particular clause which on one construction appears to offend against the rule against perpetuities, but, if it is fairly capable of another construction which avoids that objection, the latter construction is preferred, especially if it is found to be in accordance with the general intention of the will³.

In construing an ambiguous clause which, read in a particular way, offends against the rule, regard may be had to an expressed intention that the limitations are not to be contrary to the rule⁴, although such an intention will not be implied where it is not expressed⁵. A reference in an instrument to the rule against perpetuities is construed as a reference to the true rule unless it is plain from the instrument that something else is meant and what that something

else is⁶. Thus, where a draftsman draws up an instrument under a misapprehension as to the rule, the court will allow his misconception to prevail over the true rule only in the clearest of cases⁷. The circumstance that to hold the limitation void would attribute to the testator an intention of intestacy is an element which has been taken into consideration⁸.

1 *Pearks v Moseley, Re Moseley's Trusts* (1880) 5 App Cas 714 at 719, HL per Lord Selborne LC, applied in *Re Bevan's Trusts* (1887) 34 ChD 716 at 718; *Re Turney, Turney v Turney* [1899] 2 Ch 739 at 747, CA. See also *Re Campbell, Cooper v Campbell* (1919) 88 LJ Ch 239 (effect of maintenance clause, as indicating vesting at 21); *Re Hobson's Estate, Hobson v Sharp* [1907] VLR 724. In such a case words which might show that a gift is void may be rejected: *Smidmore v Smidmore* (1905) 3 CLR 344; *Re Legh's Settlement Trusts, Public Trustee v Legh* [1938] Ch 39 at 47, [1937] 3 All ER 823 at 826; *Re Baden's Deed Trusts, Baden v Smith* [1969] 2 Ch 388 at 399, [1969] 1 All ER 1016 at 1021, CA; *IRC v Williams* [1969] 3 All ER 614 at 618, [1969] 1 WLR 1197 at 1201, 1202.

2 *Leach v Leach* (1843) 2 Y & C Ch Cas 495 at 499 per Knight-Bruce V-C; and see *Re Leek, Darwen v Leek* [1969] 1 Ch 563 at 585, [1968] 1 All ER 793 at 801, CA, approving Gray's Rule against Perpetuities (4th Edn) s 633; *Re Buckton's Settlement Trusts, Public Trustee v Midland Bank Executor and Trustee Co Ltd* [1964] Ch 497 at 503, [1964] 2 All ER 487 at 490. An executory limitation on failure of issue or heirs of a person, according to the context or the construction adopted by the court (1) may refer to a failure at any indefinitely distant future time, in which case, unless an estate tail to cover all the issue precedes the limitation or is implied, the limitation will be void under the rule (*Davis v Speed* (1692) 2 Salk 675 (affd (1698) Show Parl Cas 104, HL); *Green v Rod* (1729) Fitz-G 68; *Lady Lanesborough v Fox* (1733) Cas temp Talb 262, HL; *Clare v Clare* (1734) Cas temp Talb 21; *Beauclerk v Dormer* (1742) 2 Atk 308; *Boden v Watson* (1761) Amb 398, 478; *Grey v Montagu* (1770) 3 Bro Parl Cas 314; *A-G v Hird* (1782) 1 Bro CC 170; *Bigge v Bensley* (1783) 1 Bro CC 187; *Glover v Strothoff* (1786) 2 Bro CC 33; *Barlow v Salter* (1810) 17 Ves 479; *Griffiths v Grieve* (1819) 1 Jac & W 31; *Banks v Holme* (1821) 1 Russ 394n, HL; *Bristow v Boothby* (1826) 2 Sim & St 465 (affd (1829) 3 My & Cr 151 per Lord Lyndhurst LC); and see *Ellicombe v Gompertz* (1837) 3 My & Cr 127 at 151; *Malcolm v Taylor* (1832) 2 Russ & M 416; *Candy v Campbell* (1834) 2 Cl & Fin 421, HL; *A-G v Bright* (1836) 2 Keen 57; *Wells v Malins* (1838) 3 Jur 36; *Doe d Todd v Duesbury* (1841) 8 M & W 514; *Falkiner v Hornidge* (1858) 8 I Ch R 184, Ir CA; *Re Johnson's Trusts* (1866) LR 2 Eq 716; *Dawson v Small* (1874) 9 Ch App 651; *Re Thomas, Thomas v Thomas* [1921] 1 Ch 306); or (2) may be restricted to a failure before some event connected with the limitations of the instrument, in which case, if that event is within the proper period, the limitation will be valid (Lewis's Law of Perpetuity 176 et seq; and see *Forth v Chapman* (1720) 1 P Wms 663 and the notes to it in Tudor's Leading Cases on Real Property (4th Edn) 374). See also the Wills Act 1837 s 29; *Re Leach, Leach v Leach* [1912] 2 Ch 422; and WILLS vol 50 (2005 Reissue) PARAS 740-742, 747.

3 *Martelli v Holloway* (1872) LR 5 HL 532 at 548; *Re Mortimer, Gray v Gray* [1905] 2 Ch 502 at 506, CA; *Re Earl of Stamford and Warrington, Payne v Grey* [1912] 1 Ch 343 at 365, CA; *Re Hume, Public Trustee v Mabey* [1912] 1 Ch 693 at 698 per Parker J. See also *Re Campbell, Cooper v Campbell* (1919) 88 LJ Ch 239; *Re Grotrian, Cox v Grotrian* [1955] Ch 501, [1955] 1 All ER 788; *Re Deeley's Settlement, Batchelor v Russell* [1974] Ch 454 at 464, [1973] 3 All ER 1127 at 1133; but see *Re Atkinson, Atkinson v Atkinson* [1916] 1 Ch 91 at 95.

4 *Martelli v Holloway* (1872) LR 5 HL 532 at 548. As to the effect given to the words 'as far as the rules of law will admit' with regard to executory and other gifts see PARA 1033 post. If a gift is not executory, but direct and unambiguous, and is such as to offend against the rule against perpetuities, these words do not render the gift valid: *Christie v Gosling* (1866) LR 1 HL 279 at 290; *Re Viscount Exmouth, Viscount Exmouth v Praed* (1883) 23 ChD 158; and see *Re Moore, Prior v Moore* [1901] 1 Ch 936; *Portman v Viscount Portman* [1922] 2 AC 473, HL. In *Re Finch and Chew's Contract* [1903] 2 Ch 486, an appointment on the trusts of an antecedent instrument or such of them as were 'capable of taking effect' took effect with the trusts excluded which would have been void. See also *Re Vaux, Nicholson v Vaux* [1939] Ch 465, [1938] 4 All ER 297, CA.

5 *Innes (Inspector of Taxes) v Harrison* [1954] 1 All ER 884, [1954] 1 WLR 668.

6 *IRC v Williams* [1969] 3 All ER 614 at 619, [1969] 1 WLR 1197 at 1203.

7 *IRC v Williams* [1969] 3 All ER 614 at 619, 620, [1969] 1 WLR 1197 at 1203; cf *Re Abrahams' Will Trusts, Caplan v Abraham* [1969] 1 Ch 463 at 477, [1967] 2 All ER 1175 at 1185, 1186. See also PARA 1001 text and note 2 ante, 1033 post.

8 *Montgomerie v Woodley* (1800) 5 Ves 522; *Taylor v Frobisher* (1852) 5 De G & Sm 191; *Gosling v Gosling* (1859) John 265 at 274; *Re Edmondson's Estate* (1868) LR 5 Eq 389 (where in consequence 'vested' was construed in a special sense); *Re Bevan's Trusts* (1887) 34 ChD 716; and see *Re Wenmoth's Estate, Wenmoth v Wenmoth* (1887) 37 ChD 266 at 270 (explaining *Elliot v Elliott* (1841) 12 Sim 276, and *Re Coppard's Estate, Howlett v Hodson* (1887) 35 ChD 350, as decided on this ground). As to severable limitations see PARA 1080 text and note 2 post.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(2) INTERESTS SUBJECT TO THE RULE/(i) In general/1025. Property subject to the rule.

(2) INTERESTS SUBJECT TO THE RULE

(i) In general

1025. Property subject to the rule.

The rule against perpetuities applies to all private property¹ the proprietary rights in which are governed directly by or by reference to the law of England².

Accordingly, real property (including freeholds and hereditaments, corporeal and incorporeal³) and personal property⁴ (including chattels real and personal⁵) are alike subject to the rule in so far as interests of the nature subsequently described⁶ are created in them⁷.

1 As to whether the rule against perpetuities extends to a Crown grant, and whether the Crown can generally, or in the interests of the public, annex to grants in fee conditions against alienation and other conditions which private persons are not competent to annex, see *Cooper v Stuart* (1889) 14 App Cas 286 at 290, PC; *Fowler v Fowler* (1865) 16 I Ch R 507 (where it was held that a grantee from the Crown does not by the grant acquire any particular privilege); *Flower v Hartopp* (1843) 6 Beav 476 at 494; *Anon* (1506) YB 21 Hen 7 fos 7, 8 per Vavisor J; Bro Abr, Prerogative le Roy, pl 53, 102; Chitty's Prerogatives of the Crown 386 (note (h)), 388; 2 Roll Abr, Prerogative le Roy, pl 164; Bac Abr, Prerogative (E) 3; *Rangimoeke v Strachan* (1895) 14 NZLR 477; *A-G v Cummins* [1906] 1 IR 406. In *Thellusson v Woodford* (1805) 11 Ves 112, HL it was not disputed that the Crown was bound by the rule against perpetuities with regard to a possibly remote limitation of property to the Crown made by a subject's will. See also CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 871. The Perpetuities and Accumulations Act 1964 binds the Crown: s 15 (7).

2 In *Raphael v Boehm*, *Cockburn v Raphael* (1852) 22 LJ Ch 299, trusts declared by a testator domiciled abroad of his movable estate, with an express reference to the law of inheritance in Great Britain, were invalid by the rule. Provisions in a will infringing the rule against perpetuities, or the statutory restriction on accumulation (see PARA 1121 post), were not rendered valid by execution of the will under the Wills Act 1861 (repealed and replaced by the Wills Act 1963: see WILLS vol 50 (2005 Reissue) PARAS 310, 386): *Re Grassi*, *Stubberfield v Grassi* [1905] 1 Ch 584 at 592 per Buckley J, referring to *Freke v Lord Carbery* (1873) LR 16 Eq 461 (decided under the Accumulations Act 1800 (repealed)).

The rule has been applied to property in colonies into which English law has been introduced: *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381, approving *Choa Choon Neoh v Spottiswoode* (1869) 1 Kyshe's Reports 216; Woods' Oriental Cases, Appendix 1. As to the applicability of the rule to a newly acquired colony see 1 BI Com (14th Edn) 107; *Cooper v Stuart* (1889) 14 App Cas 286, PC; and see COMMONWEALTH vol 13 (2009) PARA 867 et seq.

3 Eg rights to minerals (*Thomas v Thomas* (1902) 87 LT 58, CA), or to royalties on them (*Edwards v Edwards* [1909] AC 275, HL), or to rents (*Hartopp v Lord Carbery* (1819), cited in 1 Sanders on Uses and Trusts (5th Edn) 205, a case of an executory devise of a rent); and see Gray's Rule against Perpetuities (4th Edn) s 316 note 4; Morris and Leach's Rule against Perpetuities (2nd Edn) 229; *Dunn v Blackdown Properties Ltd* [1961] Ch 433, [1961] 2 All ER 62 (easement of drainage void); *Newham v Lawson* (1971) 22 P & CR 852 (grant of right of light before building constructed void); *London and Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1993] 1 All ER 307, [1992] 1 WLR 1278 (affd [1993] 4 All ER 157, [1994] 1 WLR 31, CA). For a contrary decision see *Ardley v St Pancras Guardians* (1870) 39 LJ Ch 871. See also *Smith v Colbourne* [1914] 2 Ch 533, CA (right to enter and block up windows). The question whether common law grants of incorporeal hereditaments (which may commence in the future: see Gilbert's Rents 59; Lewis's Law of Perpetuity 600) are subject to the rule has been frequently discussed. There was no limit fixed by the common law as to the time at which they might commence: see the Third Report of the Commissioners on the Law of Real Property (1832) 29; see also Lewis's Law of Perpetuity 603, 608, 609. The decided preponderance of opinion, however, including that of the Real Property Commissioners (see the Third Report of the Commissioners on the Law of Real Property (1832) 36, 43), is in favour of the view that the limit fixed by the rule against perpetuities either does or ought to apply: see Gray's Rule against Perpetuities (4th Edn) s 314. For a contrary decision in the case of an easement see *Ardley v St Pancras Guardians* (1870) 39 LJ Ch 871. In *Gilbertson v Richards* (1860) 5 H & N 453, Ex Ch, a proviso that a rentcharge should arise as soon as mortgagees should enter on property was held valid on the ground that it took effect as a restriction on the estate of the mortgagees and was analogous to powers of sale, which are

incidental to a mortgagee's estate. The dictum of Martin B in *Gilbertson v Richards* (1859) 4 H & N 277 at 297, which was adopted and applied in *Birmingham Canal Co v Cartwright* (1879) 11 ChD 421 at 432, to the effect that a rent might be granted to arise in any contingency, however remote, if limited to an existing person capable of alienating it, was dissented from, and *Birmingham Canal Co v Cartwright* supra was overruled, in *London and South Western Rly Co v Gomm* (1882) 20 ChD 562 at 572, 573, 584, 588, CA. *Sharpe v Durrant* (1911) 55 Sol Jo 423 (affd [1911] WN 158, CA) supports the view that the rule applies to incorporeal hereditaments; and see *South Eastern Rly Co v Associated Portland Cement Manufacturers (1900) Ltd* (1910) 1 Ch 12 at 24, 25, 33, CA, which suggests that, had the court not found that the right vested immediately and was purely personal to the parties, it would have been held subject to the rule. For the contrary view see (1911) 27 LQR 151 et seq. As to the exclusion from the rule against perpetuities of powers for the recovery of rentcharges and rentcharges created by way of indemnity against other rentcharges see PARA 1006 ante; and as to vested interests with postponed enjoyment see PARAS 1069, 1070 post.

4 The authorities as to the two kinds of property are treated as mutual; 'whenever you stop in the limitation of a fee upon a fee, there will we stop in the limitation of a term of years': *Duke of Norfolk's Case* (1683) 3 Cas in Ch 1 at 36 per Lord Nottingham LC. Cf the definition of 'perpetuity' in *Stanley v Leigh* (1732) 2 P Wms 686 at 687 per Jekyll MR, and the limits stated for personal estate in *Jee v Audley* (1787) 1 Cox Eq Cas 324; Lewis's Law of Perpetuity 169; and see Fearne's Contingent Remainders (10th Edn) 460, 461.

5 *Sheffield v Lord Orrery* (1745) 3 Atk 282; *Jee v Audley* (1787) 1 Cox Eq Cas 324.

6 See PARAS 1027, 1039 post.

7 Copyholds were similarly so subject: *Griffith v Harrison* (1791) 3 Bro CC 410; *Doe d Blesard v Simpson* (1842) 3 Man & G 929; *Blagrove v Hancock* (1848) 16 Sim 371; *Taylor v Frobisher* (1852) 5 De G & Sm 191. As from 1 January 1926 all copyhold land has been enfranchised: see REAL PROPERTY VOL 39(2) (Reissue) PARA 31 et seq.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2.
THE RULE AGAINST PERPETUITIES/(2) INTERESTS SUBJECT TO THE RULE/(i) In general/1026.
Possible extension of rule.

1026. Possible extension of rule.

It has been said that the range of interests to which the rule against perpetuities applies may be extended from time to time as the necessity arises¹, and that the court proceeds on the principle that the rule is to be applied where no other sufficient protection against remoteness is attainable².

The application of the rule to interests of children born as a result of artificial insemination³ or in vitro fertilisation⁴ has not yet been considered by the courts. Advances in cryobiology have made possible the successful long-term preservation of human semen⁵ which can be used for either artificial insemination or in vitro fertilisation many years after the death of the father⁶. Births as a result of artificial insemination using semen preserved for ten years have been recorded⁷; indefinite preservation may be possible⁸. It is easy to envisage limitations which would be void at common law, and, although the provisions of the Perpetuities and Accumulations Act 1964⁹ might have been available to save such dispositions under instruments taking effect on or after 16 July 1964¹⁰, a more satisfactory solution to many of the difficulties has been achieved by the Human Fertilisation and Embryology Act 1990 which provides that, where the sperm of a man, or an embryo the creation of which was brought about with his sperm, was used after his death, he is not to be treated as the father of the child¹¹. Further, the woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child¹². These provisions circumvent most, but not all, of the problems which would otherwise arise. One potential problem, however, which the 1990 Act does not address is the possibility of a gift by will to a cryopreserved embryo. With regard to in vitro fertilisation, the courts may be prepared to accept a child born by this process as a life in being from the moment of fertilisation in vitro¹³.

1 See *Re Hollis' Hospital Trustees and Hague's Contract* [1899] 2 Ch 540 at 552 per Byrne J (common law condition).

2 *Re Ashforth, Sibley v Ashforth* [1905] 1 Ch 535 at 545 per Farwell J (legal contingent remainder). See Challis's Law of Real Property (3rd Edn) 207-217. Cf *A-G v Cummins* [1906] 1 IR 406.

3 Human artificial insemination has been practised for hundreds of years, and in England recorded since about 1948: see the Feversham Committee Report on Human Artificial Insemination (1960) (Cmnd 1105) PARAS 12, 19 et seq. At the time of this report it was not generally thought possible to preserve human semen for longer than a matter of hours, and it was for that reason that the committee did not consider the implications of its use after the donor's death: see PARAS 40, 68. Cf *Re Fawaz, Salamy v Fawaz* [1958] VR 426.

4 In this process the ovum is taken from a woman, fertilised in a laboratory with male sperm, and implanted in the womb of a woman to develop in the normal way. A child was born by the use of this process for the first time in 1979; and twins have been born to a 62-year old woman as a result of this process (see *The Times* (1994) 19 July). As yet cryopreserved semen has not, it is thought, been used for in vitro fertilisation, but there is no medical reason why it should not be so used. It is to be noted that the fertilised embryo need not be implanted in the womb of the woman from whom it was originally taken; the womb of a 'host' mother may be used (this process is called 'embryo transfer'): see *The Lancet* (1979) vol 2 p 642 and (1979) 169 NLJ 627.

5 See 'Frozen Human Semen. Proceedings of a Workshop on the Cryobiology of Human Semen and its role in Artificial Insemination by Donor' published by the Royal College of Obstetricians and Gynaecologists (1979); Fertil and Stenil (1977) 34:397. For a bibliography of artificial insemination and cryopreservation of human semen see Bibliography of Reproduction (1978) 32 No 6. See also Cryobiology (1972) 9:332.

6 Hitherto it has not been possible to preserve human ova but the difficulties may have been overcome and it is reported that Great Britain's first 'frozen egg' baby could be born by the end of 1995 (see *The Times* (1994) 5 July).

7 See Cryobiology (1972) 9:332; JAMA (1973) p 626.

8 See JAMA (1973) p 626; ABAJ (1962) vol 48 p 942. Cryopreservation is not infallible, however: see the editorial comment to Fertil and Stenil (1977) 34:397 at 396.

9 Ie notably the Perpetuities and Accumulations Act 1964 s 3 (the 'wait and see' rule: see PARA 1009 ante) and s 4 (4) (class-closing and exclusion rules: see PARA 1075 post). The possibility of human semen being preserved for future use in this way was probably not contemplated by the draftsman of the Act.

10 Ie the commencement date of the Perpetuities and Accumulations Act 1964.

11 Human Fertilisation and Embryology Act 1990 s 28 (6) (b).

12 Ibid s 27 (1). Section 27 (1) applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs (s 27 (3)) but does not apply to any child to the extent that the child is treated by virtue of adoption as not being the child of any person other than the adopter or adopters (s 27 (2)).

13 Ie on grounds of public policy. *The Rules against Perpetuities and Excessive Accumulations* (Law Com consultation paper no 133) suggests, however, that the proposition in the text may be unsatisfactory in terms of policy. Cf ABAJ (1962) 942, (Leach) has suggested the child be treated as 'in being' throughout the period for which the sperm remains fertile. See also (1962) 6 WAL Rev 14.

UPDATE

1026 Possible extension of rule

TEXT AND NOTES--Human Fertilisation and Embryology Act 1990 ss 27, 28 do not have effect in relation to children carried by women as a result of the placing in them of embryos or of sperm and eggs, or their artificial insemination (as the case may be), after the commencement of the Human Fertilisation and Embryology Act 2008 ss 33-48 (ie after 6 April 2009: see SI 2009/479); Human Fertilisation and Embryology Act 2008 s 57(2). See CHILDREN AND YOUNG PERSONS.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(2) INTERESTS SUBJECT TO THE RULE/(ii) Legal Interests/A. REAL ESTATE/1027. Interests in real estate.

(ii) Legal Interests

A. REAL ESTATE

1027. Interests in real estate.

The following legal estates and interests in real estate¹ were held to be subject to the rule against perpetuities:

- (1) executory devises²;
- (2) springing and shifting uses³;
- (3) legal contingent remainders⁴; and
- (4) certain rights of entry on breach of a condition subsequent⁵.

1 Since 31 December 1925 only estates in fee simple absolute in possession, terms of years absolute and certain interests and charges can exist as legal estates or interests in or over land. All other estates or interests in or over land take effect in equity: see the Law of Property Act 1925 s 1 (as amended) and REAL PROPERTY vol 39(2) (Reissue) PARA 45.

2 Lewis's Law of Perpetuity 140 et seq; and see PARA 1008 note 2 ante. For examples of executory devises which were held valid see *Pells v Brown* (1620) Cro Jac 590; *Roe d Sheers v Jeffery* (1798) 7 Term Rep 589; *Thellusson v Woodford* (1805) 11 Ves 112, HL; *Cadell v Palmer* (1833) 1 Cl & Fin 372, HL; and for examples of executory devises which were held invalid see *Proctor v Bishop of Bath and Wells* (1794) 2 Hy Bl 358; *Bull v Pritchard* (1847) 5 Hare 567; *Re Finch, Abbyss v Burney* (1881) 17 ChD 211 at 221 per Malins V-C; *Re Wrightson, Battie-Wrightson v Thomas* [1904] 2 Ch 95, CA (explained in *White v Summers* [1908] 2 Ch 256 at 267, 269); *Thomas v Thomas* (1902) 87 LT 58, CA; *Edwards v Edwards* [1909] AC 275, HL.

3 *Davis v Speed* (1692) 2 Salk 675 per Holt CJ; *Lloyd v Carew* (1697) Show Parl Cas 137, HL; *Roe d Wilkinson v Tranmer* (1757) 2 Wils 75; *Carwardine v Carwardine* (1758) 1 Eden 27 at 34; Lewis's Law of Perpetuity 149; *Blandford v Thackerell* (1793) 2 Ves 238 at 241, 242; *Savill Bros Ltd v Bethell* [1902] 2 Ch 523, CA. See also *Re Ramadge's Settlement, Hamilton v Ramadge* [1919] 1 IR 205; *Bennett v Bennett* (1864) 2 Drew & Sm 266 at 276; and the Third Report of the Commissioners on the Law of Real Property (1832) 36.

4 *Re Frost, Frost v Frost* (1889) 43 ChD 246 at 253 per Kay J; *Re Ashforth, Sibley v Ashforth* [1905] 1 Ch 535; and see *Whitby v Von Luedecke* [1906] 1 Ch 783, followed in *Re Samuda's Settlement Trusts, Horne v Courtenay* [1924] 1 Ch 61. In each of these cases the remainder was created by will, or by way of use.

5 See PARA 1029 post.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(2) INTERESTS SUBJECT TO THE RULE/(ii) Legal Interests/A. REAL ESTATE/1028. Legal contingent remainders.

1028. Legal contingent remainders.

Since 31 December 1925 legal remainders in land have taken effect as equitable interests, if previously valid as legal interests; the conversion of those remainders into equitable interests did not cause them to fail¹. The applicability of the rule against perpetuities to legal contingent

remainders² will now seldom require consideration, but in the past it was the subject of much controversy³. In any case, a legal contingent remainder, where the particular estate was limited to a person or persons in being, might be valid whatever the contingency on which it depended, although it might be invalid if limited as an executory devise⁴. In such a case the nature of a remainder afforded a guarantee against remoteness, because the remainder, unless ready to take effect immediately on the determination of the particular estate, could never take effect at all as a remainder⁵. As regards such a remainder limited by will, there is, however, a doubt as to the effect on it of the Land Transfer Act 1897⁶, which vested legal estates in the personal representative⁷.

By statute, now repealed, a legal contingent remainder, limited on a contingency not too remote under the rule, which would therefore have been valid if limited as an executory devise, might take effect notwithstanding the determination of the particular estate before the contingent remainder vested⁸.

1 See the Law of Property Act 1925 s 39, Sch 1 Pt I and REAL PROPERTY vol 39(2) (Reissue) PARA 50.

2 See PARA 1027 note 4 ante.

3 It would appear that legal contingent remainders were subject to the rule in *Whitby v Mitchell* (1890) 44 ChD 85, CA (see PARA 1003 ante) and also to the modern rule against perpetuities (*Re Frost, Frost v Frost* (1889) 43 ChD 246 at 253; *Re Ashforth, Sibley v Ashforth* [1905] 1 Ch 535). See further Challis's Law of Real Property (3rd Edn) 197-200, 213-217; Lewis's Law of Perpetuity, Supplement 97 et seq; Gray's Rule against Perpetuities (4th Edn) s 287.11.

4 *Jack d Westby v Fetherstone* (1829) 2 Hud & B 320; *Doe d Winter v Perratt* (1843) 9 Cl & Fin 606, HL; *Cole v Sewell* (1848) 2 HL Cas 186; *Symes v Symes* [1896] 1 Ch 272.

5 See REAL PROPERTY vol 39(2) (Reissue) PARA 171. This rule did not apply if the determination of the particular estate was caused by forfeiture, surrender or merger: see the Real Property Act 1845 s 8 (repealed by the Law of Property (Amendment) Act 1924 s 10, Sch 10) and REAL PROPERTY vol 39(2) (Reissue) PARA 171.

6 See the Land Transfer Act 1897 ss 1, 2 (repealed and replaced as to deaths after 31 December 1925 by the Administration of Estates Act 1925 ss 1, 2).

7 The estate conferred on personal representatives by the Land Transfer Act 1897 (repealed as regards deaths after 31 December 1925) may have saved the contingent remainder from failure due to the prior determination of the particular estate (*Re Robson, Douglass v Douglass* [1916] 1 Ch 116), but the limitation may still fail for remoteness (cf *Re Finch, Abbiss v Burney* (1880) 17 ChD 211). See also *Marshall v Gingell* (1882) 21 ChD 790 at 796; *Re Brooke, Brooke v Brooke* [1894] 1 Ch 43; *Re Beavis, Beavis v Beavis* (1906) 7 SRNSW 66; *Re Campion* [1908] SALR 1.

8 Contingent Remainders Act 1877 s 1 (repealed as obsolete by the Law of Property (Amendment) Act 1924 s 10, Sch 10): see REAL PROPERTY vol 39(2) (Reissue) PARA 171.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(2) INTERESTS SUBJECT TO THE RULE/(ii) Legal Interests/A. REAL ESTATE/1029. Common law conditions.

1029. Common law conditions.

Rights of entry affecting a legal estate which are exercisable on condition broken or for any other reason may after 31 December 1925 be made exercisable, in regard to an estate in fee simple other than a rentcharge held for a legal estate¹, only within the period authorised by the rule against perpetuities². In cases where the above provision does not apply, the better opinion is that a common law condition³ in defeasance of an estate of freehold is subject to the rule against perpetuities and is invalid unless confined within the limits allowed by the rule⁴, but the question has occasioned difference of opinion⁵. Rights of entry or of re-entry in leases,

necessarily incidental to and co-extensive with estates which are themselves unaffected by the rule, are excepted from the rule⁶.

1 As to the exemption of remedies for enforcing rentcharges from the rule against perpetuities see also PARA 1006 ante.

2 Law of Property Act 1925 s 4 (3). The effect of s 4 (3) is not entirely clear, and it was suggested that its terms should be reconsidered (see the Fourth Report of the Law Reform Committee (1956) (Cmnd 18) PARAS 42, 43; and PARA 1006 note 6 ante), but no amendment was made by the Perpetuities and Accumulations Act 1964.

3 'The difference between a condition, properly so called, and a conditional limitation or executory devise is that in the case of a condition, the estate is to revert to the grantor or his heirs; in the other cases it is limited over to other persons': *Re Dugdale, Dugdale v Dugdale* (1888) 38 ChD 176 at 179 per Kay J; Fearn's Contingent Remainders 15. In the case of conditional limitations and executory devises no difficulty arises in applying the rule against perpetuities. Where a shifting use, not a right of entry, has been adopted, the rule directly applies: see the Third Report of the Commissioners on the Law of Real Property (1832) 37 and PARA 1027 ante.

4 See *Re Macleay* (1875) LR 20 Eq 186 at 187, 188 (devise 'to my brother J on the condition that he never sells out of the family'; condition, being confined to devisee himself, was not void for remoteness); *Dunn v Flood* (1883) 25 ChD 629 at 632, 633; on appeal (1885) 28 ChD 586 at 592, CA (power of re-entry on breach of covenant in conveyance); *Re Hollis' Hospital Trustees and Hague's Contract* [1899] 2 Ch 540 (conveyance in fee simple taking effect under the Statute of Uses (1535) (repealed) (see REAL PROPERTY vol 39(2) (Reissue) PARA 16 et seq), subject to condition providing for reverter in certain events; condition void as obnoxious to the rule against perpetuities); *Imperial Tobacco Co (of Great Britain and Ireland) Ltd v Wilmott* [1964] 2 All ER 510, [1964] 1 WLR 902 (right of re-entry void for perpetuity); *Re Ashforth, Sibley v Ashforth* [1905] 1 Ch 535 at 545, 546; *Re Da Costa, Clarke v Church of England Collegiate School of St Peter* [1912] 1 Ch 337 (devise of absolute interest subject to condition; condition obnoxious to rule against perpetuities); and see also *Re Fry, Reynolds v Denne* [1945] Ch 348, [1945] 2 All ER 205 (name clause) (overruled on other grounds in *Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643 at 660, 661, [1962] 2 All ER 335 at 341, 342, CA); *Cooper v Stuart* (1889) 14 App Cas 286 at 290, PC (where the question was left open whether a reservation made in a Crown grant of land in a colony would have been valid if made in England); but see *Caldy Manor Estate Ltd v Farrell* [1974] 3 All ER 753 at 756, [1974] 1 WLR 1303 at 1307, CA (emphasising the importance of distinguishing between conditions carrying a right of re-entry and covenants against alienation). See also 1 Sanders on Uses and Trusts (5th Edn) 206, 207; Lewis's Law of Perpetuity 616; Gray's Rule against Perpetuities (4th Edn) ss 300-302; Morris and Leach's Rule against Perpetuities (2nd Edn) 210-218.

5 It has been objected to the view that the rule against perpetuities applies to common law conditions that those conditions are older than the rule: see Challis's Law of Real Property (3rd Edn) 187-190, 207-213; and see the Third Report of the Commissioners on the Law of Real Property (1832) 29, 36, 43; Jarman on Wills (8th Edn) 388-390. The view that a condition subsequent is not subject to the rule has been adopted in Northern Ireland: see *Walsh v Wightman* [1927] NI 1, NI CA, following *A-G v Cummins* [1906] 1 IR 406 (where the grant operated at common law and was in the form of a determinable fee, as distinct from a fee simple subject to a condition). As to the application of the rule against perpetuities to determinable fees see PARA 1059 post and REAL PROPERTY vol 39(2) (Reissue) PARA 115.

6 See PARA 1060 post.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(2) INTERESTS SUBJECT TO THE RULE/(ii) Legal Interests/B. PERSONAL ESTATE/1030. Executory bequests, interesse termini and assignments of future goods.

B. PERSONAL ESTATE

1030. Executory bequests, interesse termini and assignments of future goods.

Executory limitations of personal estate are subject to the rule against perpetuities¹. It was contended by some authorities that the rule should apply also to the right interesse termini², but prior to 1 January 1926 the interesse termini, created by the grant to a living person of a

lease to commence at a fixed or ascertainable date in the future, was treated as a valid interest, although the date of commencement of the lease had been fixed at a time too remote if the rule were applicable³. The question has now been settled by the abolition of the doctrine of *interesse termini*⁴. Assignments of future goods have always been outside the rule⁵.

1 *Maddox v Staines* (1727) 2 P Wms 421 (affd sub nom *Staines v Maddock* (1728) 3 Bro Parl Cas 108); *Brooks v Taylor* (1729) Mos 188; *Beauclerk v Dormer* (1742) 2 Atk 308; *Sheffield v Lord Orrery* (1745) 3 Atk 282 at 287; *Butterfield v Butterfield* (1748) 1 Ves Sen 133 at 154; *Griffiths v Grieve* (1819) 1 Jac & W 31; *Lepine v Ferard* (1831) 2 Russ & M 378; *A-G v Bright* (1836) 2 Keen 57. The rule was established as to personal property with reference to bequests of future interests in terms of years: *Sanders v Cornish* (1631) Cro Car 230; *Lamb v Archer* (1692) 1 Salk 225 (not following *Child v Baylie* (1622) Cro Jac 459, Ex Ch); *Fletcher's Case* (1709) 1 Eq Cas Abr 193; and see 1 Eq Cas Abr 190n. As to the creation of future interests in chattels personal by will see WILLS vol 50 (2005 Reissue) PARA 329; and Jarman on Wills (8th Edn) 1442 et seq; and as to the creation of future interests in chattels personal by deed see PERSONAL PROPERTY; Gray's Rule against Perpetuities (4th Edn) App F s 829.

2 1 Sanders on Uses and Trusts (5th Edn) 207; Third Report of Commissioners on the Law of Real Property (1832) 29; Lewis's Law of Perpetuity 613, 614, 620.

3 *Smith v Day* (1837) 2 M & W 684; and see *Mann, Crossman and Paulin Ltd v Registrar of Land Registry* [1918] 1 Ch 202.

4 See the Law of Property Act 1925 s 149 (1) and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 118. As to limitations on the grant of future leases see PARA 1039 post and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 106, 237.

5 See PARA 1042 post.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(2) INTERESTS SUBJECT TO THE RULE/(iii) Equitable Interests/1031. Equitable interests generally.

(iii) Equitable Interests

1031. Equitable interests generally.

Equitable estates and interests¹ of all descriptions, including contingent remainders of equitable estates², are subject to the rule against perpetuities. The mode in which the estate or interest is created, whether by devise, gift inter vivos or contract, is immaterial³.

Discretionary trusts must be so limited that the discretion is not exercisable outside the perpetuity period⁴. In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies⁵, a disposition⁶ may, however, be saved by the application of the 'wait and see' principle⁷. Thus, an interest under a discretionary trust may be treated as valid for perpetuity purposes until such time as it becomes established that the discretion must be exercised, if at all, outside the perpetuity period⁸. An arrangement for the variation of a trust under a court order approving it pursuant to the Variation of Trusts Act 1958 constitutes an instrument for the purposes of the Perpetuities and Accumulations Act 1964⁹. Thus, a trust created prior to 16 July 1964 may be varied after that date with the benefit of provisions deriving their validity from the Perpetuities and Accumulations Act 1964¹⁰.

1 *Duke of Norfolk's Case* (1683) 3 Cas in Ch 1; *Massenburgh v Ash* (1684) 1 Vern 234 at 304; *Lord Dungannon v Smith* (1845) 12 Cl & Fin 546, HL.

2 *Re Finch, Abbyss v Burney* (1881) 17 ChD 211, CA; *Re Wilmer's Trusts, Moore v Wingfield* [1903] 1 Ch 874 at 879 (affd [1903] 2 Ch 411, CA); *Re Ashforth, Sibley v Ashforth* [1905] 1 Ch 535; and see *Re Clarke's*

Settlement Trust, Wanklyn v Streatfeild [1916] 1 Ch 467 (rule in *Whitby v Mitchell* (1890) 44 ChD 85, CA: see PARA 1028 note 3 ante).

3 *London and South Western Rly Co v Gomm* (1882) 20 ChD 562 at 581, CA per Jessel MR.

4 See *Re Coleman, Public Trustee v Coleman* [1936] Ch 528, [1936] 2 All ER 225; *Re Allan's Will Trusts, Curtis v Nalder* [1958] 1 All ER 401, [1958] 1 WLR 220; *Re Hubbard's Will Trusts, Marston v Angier* [1963] Ch 275, [1962] 2 All ER 917; *Re Leek, Darwen v Leek* [1967] Ch 1061 at 1077, [1967] 2 All ER 1160 at 1166 (affd on appeal on different grounds [1969] 1 Ch 563, [1968] 1 All ER 793, CA).

5 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

6 For the meaning of 'disposition' see PARA 1009 note 1 ante.

7 See the Perpetuities and Accumulations Act 1964 s 3 (1)-(3) and PARA 1009 ante.

8 See *ibid* s 3 (2) and PARA 1009 ante.

9 See PARA 1009 note 2 ante.

10 See *Re Holt's Settlement, Wilson v Holt* [1969] 1 Ch 100 at 109, 120, [1968] 1 All ER 470 at 472, 479 (provision for accumulation). See also *Re Lloyd's Settlement, Lloyd v Leeper* [1967] 2 All ER 314n, [1967] 2 WLR 1078; *IRC v Holmden* [1968] AC 685, [1968] 1 All ER 148, HL; and see Maudsley's Modern Law of Perpetuities 212-216.

It seems that the perpetuity or accumulation period may be made to start afresh with each variation: see *Re Holt's Settlement, Wilson v Holt* supra; Maudsley's Modern Law of Perpetuities 212-216. It is not clear whether such an arrangement for the variation of trusts necessarily involves a disposition for the purposes of the Perpetuities and Accumulations Act 1964: see *IRC v Holmden* supra at 703, 704, 705, 712 and at 152, 153, 158, 159. Cf *Re Holt's Settlement* supra at 113, 115 and at 474-476.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(2) INTERESTS SUBJECT TO THE RULE/(iii) Equitable Interests/1032. Construction of executory trusts.

1032. Construction of executory trusts.

In common with other trusts, executory trusts are subject to the rule against perpetuities¹, but they are executed by the court in such a way as to preclude the objection arising from the rule and moulded so as to carry out the testator's intention as far as the rules of law admit². Any provisions which offend against the rule are omitted³, modified⁴ or confined within the perpetuity period⁵, unless the creator of the trust has specifically or by necessary implication directed their inclusion⁶, or the trust is wholly incapable of being executed so as to avoid the objection⁷.

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies⁸, where the settlor directs provisions which infringe the rule, they may be treated as valid until such time as it becomes established that they must take effect, if at all, outside the perpetuity period⁹.

1 *Gower v Grosvenor* (1740) 5 Madd 337; *Duke of Marlborough v Earl Godolphin* (1759) 1 Eden 404 at 422; *Blackburn v Stables* (1814) 2 Ves & B 367; Lewis's Law of Perpetuity 574; and see *Re Flavel's Will Trusts, Coleman v Flavel* [1969] 2 All ER 232, [1969] 1 WLR 444.

2 *Christie v Gosling* (1866) LR 1 HL 279 at 290. As to the form of a settlement to give effect to executory trusts see *Re Beresford-Hope, Aldenham v Beresford-Hope* [1917] 1 Ch 287. Cf *Pole v Pole* [1924] 1 Ch 156, CA.

3 *Miles v Harford* (1879) 12 ChD 691. In *Re Flavel's Will Trusts, Coleman v Flavel* [1969] 2 All ER 232 at 235, [1969] 1 WLR 444 at 447, 448, Stamp J, distinguishing *Miles v Harford* supra, refused to limit the objects of an

executory trust so as to avoid the rule against perpetuities because to do so would have excluded persons whom the settlor intended to benefit and so defeated, not implemented, his intentions.

4 *Lord Dorchester v Earl Effingham* (1813) 10 Sim 587n; *Woolmore v Burrows* (1827) 1 Sim 512.

5 *Duke of Newcastle v Countess of Lincoln* (1797) 3 Ves 387 (on appeal (1806) 12 Ves 218, HL); *Banks v Baroness le Despencer* (1840) 10 Sim 576 (for the order in this case see (1843) 11 Sim 508; Lewis's Law of Perpetuity, Appendix III); *Lyddon v Ellison* (1854) 19 Beav 565; *Shelley v Shelley* (1868) LR 6 Eq 540.

6 *Sackville-West v Viscount Holmesdale* (1870) LR 4 HL 543.

7 *Tregonwell v Sydenham* (1815) 3 Dow 194. As to this case see further PARA 1052 note 4 post.

8 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

9 See *ibid* s 3 (1) and PARA 1009 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(2) INTERESTS SUBJECT TO THE RULE/(iii) Equitable Interests/1033. Effect of qualifying words.

1033. Effect of qualifying words.

Where property is settled or directed to be settled in a particular course of succession as far 'as the rules of law will admit'¹, or with any other qualifying words to the like effect, then, according to the intention shown, the qualification may refer either to the quality of the property, to which the course of succession may be inapt, as in the case of personal property settled to follow real estate² (this being the ordinary sense of the words in such a case³) or to the length of time that the property is to be tied up, having regard to the rule against perpetuities. Saving words in a creating instrument may have a wider ambit than if used in a derivative instrument⁴.

In the first case, no executory trust is necessarily created, nor are the interests deemed to be settled to the limits of time allowed by the rule⁵.

In the second case, if the intention is that the property is to be tied up as long as possible, then an executory trust may be created; but the trust must be executed by prolonging the settlement, not to the furthest limit possible in any event under the rule, but to that convenient limit which will enable the primary purpose of the instrument to be carried out⁶. In such a case the court inclines to give life interests only to all persons becoming entitled under the limitations who are in existence at the date of the instrument, or the death of the testator, creating the limitations⁷.

1 As to these words see also PARA 1024 note 4 ante.

2 Since 31 December 1925 entailed interests can be created in personal estate: see PARA 1081 post and SETTLEMENTS vol 42 (Reissue) PARAS 611, 939.

3 *Vaughan v Burslem* (1790) 3 Bro CC 101; *Countess of Lincoln v Duke of Newcastle* (1806) 12 Ves 218, HL; *Gosling v Gosling* (1862) 1 De GJ & Sm 1 (affd sub nom *Christie v Gosling* (1866) LR 1 HL 279). See also Gray's Rule against Perpetuities (4th Edn) ss 364, 365; Morris and Leach's Rule against Perpetuities (2nd Edn) 201.

4 See *IRC v Williams* [1969] 3 All ER 614 at 620, [1969] 1 WLR 1197 at 1204; *Re Earl of Coventry's Indentures, Smith v Earl of Coventry* [1974] Ch 77 at 96, 97, [1973] 3 All ER 1 at 17, 18.

5 See the cases cited in note 3 supra; *Lord Deerhurst v Duke of St Albans* (1820) 5 Madd 232, where, however, the order made was reversed on appeal sub nom *Lady Tollemache v Earl and Countess of Coventry* (1834) 8 Bli NS 547, HL. As to the basis of the decision on appeal see *Re Hill, Hill v Hill* [1902] 1 Ch 807 at 813,

814, CA; *Gosling v Gosling* (1862) 1 De GJ & Sm 1 at 14. *Gower v Grosvenor* (1740) 5 Madd 337 and *Trafford v Trafford* (1746) 3 Atk 347 are not good law on this point.

6 *Countess of Lincoln v Duke of Newcastle* (1806) 12 Ves 218 at 236, HL per Lord Eldon dissenting; *Williams v Teale* (1847) 6 Hare 239; *Shelley v Shelley* (1868) LR 6 Eq 540; *Re Steele's Will Trusts, National Provincial Bank Ltd v Steele* [1948] Ch 603, [1948] 2 All ER 193. As to the form of settlement see *Re Beresford-Hope, Aldenham v Beresford-Hope* [1917] 1 Ch 287. Cf *Pole v Pole* [1924] 1 Ch 156, CA.

7 *Woolmore v Burrows* (1827) 1 Sim 512 at 526 per Hart V-C; *Bankes v Baroness le Despencer* (1840) 10 Sim 576 at 591, 594; *Williams v Teal* (1847) 6 Hare 239; and see *Pownall v Graham* (1863) 33 Beav 242.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(2) INTERESTS SUBJECT TO THE RULE/(iii) Equitable Interests/1034. Trusts for sale.

1034. Trusts for sale.

A trust for sale arising, otherwise than by statute¹, at a time beyond the perpetuity period is invalid²; but, where the trust for sale is mere machinery for facilitating a division between the persons for whom the property is destined, effect will be given to the equitable interests as if the trust for sale were omitted³. Where, therefore, the vesting of these equitable interests is within the perpetuity period, they are not rendered invalid by the failure of the trust for sale⁴, but devolve as if the property were unaffected by the trust for sale⁵; but, where the vesting of these equitable interests may not be within the perpetuity period, they are invalid⁶. An estate in trustees may, however, be validly created even though the beneficial interests are void for remoteness⁷.

Where the only risk of remoteness arises from a possibility that the trustees in breach of trust may postpone sale, that risk is disregarded for the purposes of the rule⁸.

Under the Perpetuities and Accumulations Act 1964, the mere fact that a trust for sale might not arise until the perpetuity period has expired does not invalidate it⁹. Until such time as it is established that the trust must arise, if at all, outside the perpetuity period, it is to be treated as valid⁹. Similarly, where the trust itself complies with the rule but the beneficial interests arising under it could arise outside the period, they may be saved by the application of the 'wait and see' rule⁹.

The rule against perpetuities does not operate to invalidate a power conferred on trustees or other persons¹⁰ to sell, lease, exchange or otherwise dispose of any property for full consideration, or to do any other act in the administration (as opposed to the distribution)¹¹ of any property¹²; nor does that rule prevent the payment to trustees or other persons of reasonable remuneration for their services¹³. Even where the power extends to distribution, it may be treated as valid under the 'wait and see' rule¹⁴.

1 The statutory trusts for sale arising under the Settled Land Act 1925 s 36 (see SETTLEMENTS vol 42 (Reissue) PARAS 713-714) and the Law of Property Act 1925 ss 34-36 (see REAL PROPERTY vol 39(2) (Reissue) PARA 211) would appear to be outside the rule.

2 *Hale v Pew* (1858) 25 Beav 335; *Re Wood, Tullett v Colville* [1894] 3 Ch 381, CA; *Re Davies and Kent's Contract* [1910] 2 Ch 35, CA; *Re Bewick, Ryle v Ryle* [1911] 1 Ch 116. Where, however, the determination of the term takes place and the trust for sale arises at one and the same moment, the trust for sale is not void for remoteness: *English v Cliff* [1914] 2 Ch 376. It seems that the fact that the trustees to exercise the trust for sale are the original trustees will not save the trust, if otherwise void for perpetuity. See also *Re Allott, Hanmer v Allott* [1924] 2 Ch 498, CA (power of leasing), commented upon in the Fourth Report of the Law Reform Committee (1956) (Cmd 18) PARA 34, and abrogated by the Perpetuities and Accumulations Act 1964 s 8 (see the text and notes 10, 11 infra). Cf *Re Morphey, Worthington v Church Comrs* (1957) 107 L Jo 299.

3 *Goodier v Edmunds* [1893] 3 Ch 455 (following *Goodier v Johnson* (1881) 18 ChD 441 at 446, CA per Jessel MR), followed in *Re Daveron, Bowen v Churchill* [1893] 3 Ch 421, and approved in *Re Appleby, Walker v Lever, Walker v Nisbet* [1903] 1 Ch 565, CA. Cf *Re Garnham, Taylor v Baker* [1916] 2 Ch 413 (no conversion effected). See also (1925) 41 LQR 52 et seq.

4 *Re Daveron, Bowen v Churchill* [1893] 3 Ch 421; *Goodier v Edmunds* [1893] 3 Ch 455; *Re Appleby, Walker v Lever, Walker v Nisbet* [1903] 1 Ch 565, CA.

5 *Goodier v Edmunds* [1893] 3 Ch 455; *Re Appleby, Walker v Lever, Walker v Nisbett* [1903] 1 Ch 565, CA; *Re Garnham, Taylor v Baker* [1916] 2 Ch 413.

6 Ie as in the case of a gift to a class living or ascertainable at the time of sale: *Read v Gooding* (1856) 21 Beav 478; *Blight v Hartnoll* (1881) 19 ChD 294; *Re Bewick, Ryle v Ryle* [1911] 1 Ch 116. See also *Re Allott, Hanmer v Allott* [1924] 2 Ch 498, CA, commented upon in the Fourth Report of the Law Reform Committee (1956) (Cmd 18) PARA 34, and abrogated by the Perpetuities and Accumulations Act 1964 s 8 (see the text and notes 10, 11 infra). Cf *Re Morphey, Worthington v Church Comrs* (1957) 107 L Jo 299.

7 *Tregonwell v Sydenham* (1815) 3 Dow 194; *Newman v Newman* (1839) 10 Sim 51 (in both of which the beneficial interest went to the heir-at-law).

8 *Re Atkins' Will Trusts, National Westminster Bank Ltd v Atkins* [1974] 2 All ER 1 at 7, [1974] 1 WLR 761 at 768. See also *Re Petrie, Lloyds Bank Ltd v Royal National Institute for the Blind* [1962] Ch 355, [1961] 3 All ER 1067, CA.

9 See the Perpetuities and Accumulations Act 1964 s 3 (1) and PARA 1009 ante.

10 They need not be trustees, nor need there be a valid subsisting trust: see Morris and Leach's Rule against Perpetuities (2nd Edn), 1964 Supplement 15.

11 For a discussion of the distinction between disposition and administrative powers see *Pearson v IRC* [1980] 2 All ER 479 at 486, 487, [1980] 2 WLR 872 at 880, 881, HL per Viscount Dilhorne.

12 Perpetuities and Accumulations Act 1964 s 8 (1). Section 8 (1) applies for the purpose of enabling a power to be exercised at any time on or after 16 July 1964 (the commencement date of the Act) notwithstanding that the power is conferred by an instrument which took effect before that date: s 8 (2). As to instruments to which the Act applies see PARA 1009 note 2 ante.

13 Ibid s 8 (1). See also note 12 supra. Cf *Queen's University of Belfast v A-G for Northern Ireland* [1966] NI 115 (provision for remuneration of trustees as part of the administration of a charitable trust).

14 See the Perpetuities and Accumulations Act 1964 s 3 (1) and PARA 1009 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(2) INTERESTS SUBJECT TO THE RULE/(iii) Equitable Interests/1035. Trusts of indefinite duration.

1035. Trusts of indefinite duration.

Trusts lasting for a possibly indefinite period of time, where the interests arising under them may not be vested within the perpetuity period, so that the beneficiaries cannot put an end to the trusts¹, are within the rule against perpetuities².

A discretionary trust of the income of a fund for the maintenance of a class of persons, some unborn, which may possibly last longer than the perpetuity period, is, therefore, void³. Similarly, a gift to an unincorporated association for the benefit of present and future members indefinitely was void prior to the Perpetuities and Accumulations Act 1964⁴, but it is thought that it will now operate in favour of those members ascertained within the perpetuity period⁵. A trust of income, not discretionary, for the maintenance of the children of a living person, in equal shares, where the interest of each child is fixed, is not, however, void, even if the trust may terminate after the perpetuity period⁶.

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies⁷, the 'wait and see' rule may operate to save the trust until such time, if any, as it is established that the interest arising under it must vest outside the perpetuity period⁸. The validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise will not be affected by its becoming so established⁹.

1 An indefinite trust, where the interests are vested and the beneficiaries can put an end to the trust, is not affected by the rule: see PARA 1052 post.

2 *Mainwaring v Baxter* (1800) 5 Ves 458 (restraining disentail); *Thomson v Shakespear* (1860) 1 De GF & J 399 (to an official for the time being); *Smith v Cuninghame* (1884) 13 LR Ir 480; *Trustees, Executors and Agency Co Ltd v Bush* (1908) 28 NZLR 117; *Girard Trust Co v Russell* 179 F 446 (US 1910). See also *Kennedy v Kennedy* [1914] AC 215, PC (trust to maintain a dwelling house until sold at an indefinite future period); distinguished in *Re Cassel, Public Trustee v Mountbatten* [1926] Ch 358 (where the interest vested within the period); and see *Beachway Management Ltd v Wisewell* [1971] Ch 610, [1971] 1 All ER 1, following *Re Cassel, Public Trustee v Mountbatten* supra). See also PARA 1005 ante. As to limitations to a series see PARA 1080 post; and as to gifts to the survivors of a class of unborn persons see PARA 1067 post.

3 *Re Blew, Blew v Gunner* [1906] 1 Ch 624, not following *Re Wise, Jackson v Parrott* [1896] 1 Ch 281, and *Re Watson, Cox v Watson* [1892] WN 192. In *Longfield v Bantry* (1885) 15 LR Ir 101, a trust of a residue to apply the income on improvement of two estates at discretion was held to be confined to a reasonable time. See also *Re Sampson, Sampson v Sampson* [1896] 1 Ch 630 at 634; *Kennedy v Kennedy* [1914] AC 215, PC; *Re De Sommers, Coelenbier v De Sommers* [1912] 2 Ch 622 (distinguished in *Innes (Inspector of Taxes) v Harrison* [1954] 1 All ER 884, [1954] 1 WLR 668); *Re Benyon-Winsor, Cartwright v Winsor* (1917) 143 LT Jo 178; *Re Symm's Will Trusts, Public Trustee v Shaw* [1936] 3 All ER 236.

4 *Leahy v A-G for New South Wales* [1959] AC 457, [1959] 2 All ER 300, PC; *Re McCullough* [1966] NI 73; and see PARA 1005 ante.

5 See the Perpetuities and Accumulations Act 1964 ss 3 (1), (4), 4 (4); and 1976 ASCL 421. Cf the contradictory statements referred to in PARA 1005 note 12 ante, where the 1964 Act was not considered.

6 *Gooding v Read* (1853) 4 De GM & G 510; explained and distinguished in *Re Blew, Blew v Gunner* [1906] 1 Ch 624. See also *Patching v Barnett* (1881) 51 LJ Ch 74, CA; *Williams v Papworth* [1900] AC 563 at 566, PC. If an interest vests within the period, its duration beyond the period is no infringement of the rule: see *Re Cassel, Public Trustee v Mountbatten* [1926] Ch 358; distinguished in *Re Johnson's Settlement Trusts, McClure v Johnson* [1943] Ch 341, [1943] 2 All ER 499. In *Re O'Brien's Estate, Prytz v Trustees, Executors and Agency Co Ltd* (1898) 24 VLR 360, the same rule was applied, the shares of the children being fixed, but a discretion being given as to the part of the share applied for maintenance. In *Pickford v Brown, Brown v Brown* (1856) 2 K & J 426, the discretionary trust was treated as a part of the void gift to the class and therefore itself void.

7 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

8 See *ibid* s 3 (1) and PARA 1009 ante. As to the exclusion of class members to avoid remoteness see s 4 (3), (4) and PARA 1075 post. The Perpetuities and Accumulations Act 1964 does not affect the position of purpose trusts: see s 15 (4) and PARA 1005 note 7 ante.

9 See *ibid* ss 3 (1), 4 (5).

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(2) INTERESTS SUBJECT TO THE RULE/(iv) Interests under Contracts/1036. Contracts creating property rights.

(iv) Interests under Contracts

1036. Contracts creating property rights.

A contract for the sale of land in the ordinary form does not infringe the rule against perpetuities, even if no date is fixed for completion, as in such a case the contract must be

completed within a reasonable time and either party may give to the other notice to complete within such a time¹.

When a contract² creates a right of property to arise in the future, or in other words a limitation of property, the rule against perpetuities applies³ to the creation of that right of property, as distinct from the personal obligation in contract⁴.

An equitable estate or interest to arise in the future, under a contract, is also within the rule⁵. Although a contract is not within the rule, a transfer of a contract may be within it⁶.

A contract relating to a right of or equitable interest in property in the future may be intended to create a limitation of land only, in which case, if the limitation is to take effect beyond the perpetuity period, the contract is wholly void and unenforceable⁷; or the contract may, upon its true construction, be a personal contract only, in which case the rule does not apply to it⁸; or it may, upon its true construction, be, as regards the original covenantor, both a personal contract and a contract attempting to create a remote limitation. In the last-mentioned case the limitation will be bad for perpetuity, but the personal contract will be enforceable, if the case otherwise admits, against the promisor by specific performance or in damages⁹, or against his personal representatives in damages¹⁰, or possibly by specific performance¹¹. Unless the burden of the contract runs with the land¹², it will not, however, be enforceable against the promisor's assign¹³. In all cases it is a question of construction whether the contract is intended to create a limitation of property only, or a personal obligation only, or both.

Where, however, a disposition¹⁴ inter vivos taking effect on or after 16 July 1964¹⁵ would fall to be treated as void for remoteness if the rights and duties under it were capable of transmission to persons other than the original parties and had been so transmitted, it is to be treated as void as between the person by whom it was made and the person to whom or in whose favour it was made or any successor of his, and no remedy lies in contract or otherwise for giving effect to it or making restitution for its lack of effect¹⁶. A right transmissible to third persons is thus vitiated even as between the original parties if, having regard to the provisions of the Perpetuities and Accumulations Act 1964¹⁷, it becomes established that it must fail for remoteness.

1 *Re Doyle's Estate* [1907] IR 204 at 211.

2 The rule against perpetuities is not concerned with contracts as such: see PARA 1057 post.

3 *London and South Western Rly Co v Gomm* (1882) 20 ChD 562 at 582, CA; *South Eastern Rly Co v Associated Portland Cement Manufacturers (1900) Ltd* [1910] 1 Ch 12 at 33, 34, CA; *Hutton v Watling* [1948] Ch 26 at 36, [1947] 2 All ER 641 at 645 (affd on another point [1948] Ch 398, [1948] 1 All ER 803, CA).

4 *Worthing Corpn v Heather* [1906] 2 Ch 532 at 538-540; cf *Crane v Wallasey Corpn* (1912) 107 LT 150, DC (agreement to set back a road).

5 *London and South Western Rly Co v Gomm* (1882) 20 ChD 562 at 581, CA per Jessel MR.

6 See Gray's Rule against Perpetuities (4th Edn) s 329 note (1).

7 *London and South Western Rly Co v Gomm* (1882) 20 ChD 562 at 580, CA. See also *Starcher Bros v Duty* 123 Am St R 990 (1907).

8 *Stocker v Dean* (1852) 16 Beav 161; and see PARA 1057 post. Cf *Re Cousins, Alexander v Cross* (1885) 30 ChD 203, CA (devise, giving an option of purchase on annuitants' death).

9 *South Eastern Rly Co v Associated Portland Cement Manufacturers (1900) Ltd* [1910] 1 Ch 12 at 33, CA; *Hutton v Watling* [1948] Ch 26, [1947] 2 All ER 641 (affd on another point [1948] Ch 398, [1948] 1 All ER 803, CA) (option to purchase land), not following *Rider v Ford* [1933] 1 Ch 541; and see *Longmuir v Kew* [1960] 3 All ER 26 at 29, [1960] 1 WLR 862 at 865. However, see now the Perpetuities and Accumulations Act 1964 s 10 (cited infra).

10 *Worthing Corpn v Heather* [1906] 2 Ch 532 (option in lease to purchase reversion).

11 See *Kennewell v Dye* [1949] Ch 517, [1949] 1 All ER 881 (specific performance of an option to a tenant to purchase the reversion granted against the landlord's personal representatives, although the question of perpetuity was apparently not considered).

12 As to the exemption of covenants running with land from the rule against perpetuities see PARA 1006 ante; and as to options for renewal in leases see PARA 1039 post.

13 *London and South Western Rly Co v Gomm* (1882) 20 ChD 562, CA; *Woodall v Clifton* [1905] 2 Ch 257, CA (option to purchase reversion contained in lease; such an option, unlike an option to renew a lease, did not run with reversion). Cf *Griffith v Pelton* [1958] Ch 205 at 225, [1957] 3 All ER 75 at 83, CA. See also *Webb v Pollmount Ltd* [1966] Ch 584 at 596, 597, [1966] 1 All ER 481 at 485.

14 For the meaning of 'disposition' see PARA 1009 note 1 ante.

15 I.e. the commencement date of the Perpetuities and Accumulations Act 1964.

16 Ibid s 10, which effectively abrogates the decisions in cases such as *Hutton v Watling* [1948] Ch 26, [1947] 2 All ER 641 (affd [1948] Ch 398, [1948] 2 All ER 803, CA); and *Worthing Corp v Heather* [1906] 2 Ch 532.

It seems that the Perpetuities and Accumulations Act 1964 s 10 is not confined to contracts and is equally applicable to personal property and land: see 256 HL Official Report (5th series), 19 March 1964, col 978. However, the Perpetuities and Accumulations Act 1964 s 9 applies only to options to purchase an interest in land or an interest reversionary on the term of a lease: see further PARA 1037 post. It may also apply to contracts not capable of binding third persons: see Morris and Leach's Rule against Perpetuities (2nd Edn), 1964 Supplement 17; 2 Wolstenholme and Cherry's Conveyancing Statutes (13th Edn) 145; and see (1964) 80 LQR 524, 525. In this regard it should, however, be noted that, even if specific performance is not available against a third person, an injunction may nevertheless lie: see *De Mattos v Gibson* (1858) 4 De G & J 276 at 282; *Swiss Bank Corp v Lloyds Bank Ltd* [1979] Ch 548 at 570-575, [1979] 2 All ER 853 at 869-874.

17 See particularly the Perpetuities and Accumulations Act 1964 s 3 (1) (the 'wait and see' rule) and PARA 1009 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(2) INTERESTS SUBJECT TO THE RULE/(iv) Interests under Contracts/1037. Options to purchase.

1037. Options to purchase.

A common example of an equitable interest to arise in the future under a contract is an option to purchase, or to repurchase, in or collateral to a conveyance or a lease for a term of more than 21 years. Such an option is bad for perpetuity, if unlimited in point of time, in so far as it creates an interest in land¹, although, in so far as it gives rise to a personal right and liability in contract, it may be enforceable to the extent previously mentioned². Such an option³ confined to the lives of the parties and not more than 21 years after is, however, valid⁴. It is not sufficient to confine it to the period of continuance of a strict settlement, which may last an indefinite period⁵. An option taken by statutory undertakers may be valid if limited to the period allowed for completion of the works⁶ or, as a matter of construction, it may be so limited as to be exercisable only within the perpetuity period⁷. An option revocable by the holder of the estate for the time being may be outside the rule against perpetuities⁸.

The rule against perpetuities does not apply to a disposition⁹ taking effect on or after 16 July 1964¹⁰ consisting of the conferring of an option to acquire for valuable consideration an interest reversionary, whether directly or indirectly, on the term of a lease¹¹ if:

- 29 (1) the option is exercisable only by the lessee or his successors¹² in title¹³; and
- 30 (2) it ceases to be exercisable at or before the expiration of one year following the determination of the lease¹⁴.

In the case of a disposition consisting of the conferring of an option to acquire for valuable consideration any interest in land, the perpetuity period under the rule against perpetuities is 21 years, and the statutory power to specify a perpetuity period not exceeding 80 years¹⁵ does not apply¹⁶. This applies not only to the proprietary interest created but also to the personal obligation between the contracting parties¹⁷.

1 *London and South Western Rly Co v Gomm* (1882) 20 ChD 562, CA; *Worthing Corp v Heather* [1906] 2 Ch 532; *Woodall v Clifton* [1905] 2 Ch 257, CA. See also the Fourth Report of the Law Reform Committee (1956) (Cmd 18) PARAS 35-38. As to options to purchase in leases see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 135-138; and see *Webb v Pollmount Ltd* [1966] Ch 584 at 596, 597, [1966] 1 All ER 481 at 485. In *Re Adams and Kensington Vestry* (1884) 27 ChD 394, CA the option had been exercised without question.

2 See PARA 1036 ante.

3 An option is not strictly speaking either an offer or a conditional contract. It does not have *all* the incidents of the standard form of either of these concepts. To that extent it is a relationship *sui generis*. There are, however, ways in which it resembles each of them. Each analogy is in the proper context a valid way of characterising the situation created by an option. The question in each case is which is the appropriate analogy: *Spiro v Glencrown Properties Ltd* [1991] Ch 537, [1991] 1 All ER 600; *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314 at 321, [1960] 1 WLR 549 at 556 (affd [1961] Ch 105, [1961] 1 All ER 90, CA); *Griffith v Pelton* [1958] Ch 205 at 225, [1957] 3 All ER 75 at 83, CA. See also *George Wimpey & Co Ltd v IRC* [1974] 2 All ER 602 at 606, [1974] 1 WLR 975 at 979 (affd [1975] 2 All ER 45, [1975] 1 WLR 995, CA); *Mountford v Scott* [1975] Ch 258 at 264, [1975] 1 All ER 198 at 200, CA; *Wm Cory & Son Ltd v IRC* [1965] AC 1088 at 1108, [1965] 1 All ER 917 at 921, HL. See also SALE OF LAND vol 42 (Reissue) PARA 27.

4 *Lloyd v Carew* (1697) Prec Ch 72, HL; *Marks v Marks* (1718) 10 Mod Rep 419; and see *Cox v Archer* (1964) 110 CLR 1 (Aust HC); *Re Seldon* [1970] 2 OR 201, 10 DLR (3d) 306.

5 *Trevelyan v Trevelyan* (1885) 53 LT 853.

6 *Kemp v South Eastern Rly Co* (1872) 7 Ch App 364; *London and South Western Rly Co v Gomm* (1882) 20 ChD 562 at 580, CA; and see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 550, 552.

7 See eg *Longmuir v Kew* [1960] 3 All ER 26, [1960] 1 WLR 862.

8 Ie under the principle that a future interest which can be destroyed by the holder of the present interest is outside the rule: see Morris and Leach's Rule against Perpetuities (2nd Edn) 195, 222; Barnsley's Land Options (2nd Edn) 41; but see Gray's Rule against Perpetuities (4th Edn) s 203 note 2. It is not clear whether an option destructible at will by the grantor or holder for the time being is properly classified as an 'option' at all; it is difficult to see why it should be treated differently from an ordinary offer which can be withdrawn at any time before acceptance: see *Pritchard v Briggs* [1980] Ch 338 at 391, [1980] 1 All ER 294 at 307, CA (where an option is described as an 'irrevocable offer'). See also *Paterson v Houghton* (1909) 19 Man LR 168 (right to accept an offer 'within a limited or reasonable period'); *Mackay v Wilson* (1947) 47 SRNSW 315 at 325 ('a continuing offer'); and see the meaning of 'option' in the Oxford English Dictionary (2nd Edn) vol X p 878 as the privilege of executing a commercial transaction 'within a specified period'.

9 For the meaning of 'disposition' see PARA 1009 note 1 ante.

10 Ie the commencement date of the Perpetuities and Accumulations Act 1964. As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

11 These provisions apply in relation to an agreement for a lease as they apply in relation to a lease; and 'lessee' is to be construed accordingly: *ibid* s 9 (1). The lease must be in existence at the date of the disposition: Barnsley's Land Options (2nd Edn) 44. See, however, *Weg Motors Ltd v Hales* [1962] Ch 49, [1961] 3 All ER 181, CA.

12 It seems probable that 'successors' means successors to the leasehold term so that an option capable of assignment to a person other than an assignee of the term does not fall within this exception: see Barnsley's Land Options (2nd Edn) 43. Options are *prima facie* freely assignable: see *Re Button's Lease, Inman v Button* [1964] Ch 263 at 273, [1963] 3 All ER 708 at 714.

13 Perpetuities and Accumulations Act 1964 s 9 (1) (a).

14 *Ibid* s 9 (1) (b).

15 Ie *ibid* s 1 (1): see PARA 1010 ante.

16 Ibid s 9 (2). Section 9 (2) does not, however, apply to a right of pre-emption conferred on a public or local authority in respect of land used or to be used for religious purposes where the right becomes exercisable only if the land ceases to be used for such purposes: s 9 (2) proviso. A right of pre-emption, as such, is not an interest in land: see *Pritchard v Briggs* [1980] Ch 338 at 374, [1980] 1 All ER 294, CA; revsg [1980] Ch 338, [1978] 1 All ER 886; and see PARA 1038 note 1 post.

It now appears that a right of pre-emption, being purely contractual in nature, is wholly outside the rule against perpetuities at common law. It is submitted that the Perpetuities and Accumulations Act 1964 s 9 (2) proviso, in so far as it suggests otherwise, merely reflects a misunderstanding of the difference in juridical nature between options and rights of pre-emption which prevailed prior to the decision of the Court of Appeal in *Pritchard v Briggs* supra: see *Pritchard v Briggs* supra at 395, 396, 398 and at 312, 313.

When the contingency occurs on which the obligation to offer for sale arises, the right of pre-emption is converted into an option: see *Pritchard v Briggs* supra at 419, 422, 423 and at 329, 330, 332. Cf, however, *Pritchard v Briggs* supra at 396 and at 311 per Goff LJ.

It is submitted that, in so far as the 'conversion' constitutes a 'disposition', the Perpetuities and Accumulations Act 1964 s 9 (2) applies, the 21-year period running from the date of 'conversion'. It may, however, be that, in so far as a so-called right of pre-emption conferred on a public or local authority in respect of land used or to be used for religious purposes and exercisable only if the land ceases to be used for those purposes gives rise to an option, s 9 (2) does not apply to the option, ie it is subject to the rule against perpetuities in the normal way, and a period not exceeding 80 years available under s 1 (1) (see PARA 1010 ante) may be used.

17 See ibid s 10 and PARA 1036 ante; and see PARA 1057 post.

UPDATE

1037 Options to purchase

NOTE 16--See *Wilson v Truelove* [2003] EWHC 750 (Ch), [2003] 23 EG 136. As to the status of pre-emption rights following the enactment of the Land Registration Act 2002 s 115, see LAND REGISTRATION vol 26 (2004 Reissue) PARA 939 note 3.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(2) INTERESTS SUBJECT TO THE RULE/(iv) Interests under Contracts/1038. Rights of pre-emption and repurchase.

1038. Rights of pre-emption and repurchase.

A right to arise on any intended sale or other particular kind of alienation by the owner, for example a right of pre-emption¹ or first refusal, is not subject to the rule against perpetuities²; it does not bind the land but merely creates a contractual right in the person on whom it is conferred³. It may be entirely void, however, if intended as a total check on alienation by the owner⁴.

The same rule applies to covenants to reconvey⁵ and provisos for repurchase⁶, but not where such a covenant or proviso does not express the true nature of the transaction, as where the instrument is really a lease⁷ or mortgage⁸.

1 It is important to distinguish between a right of pre-emption and an option because the latter is an interest in land whereas the former is merely a personal right. The test of whether a particular arrangement is an option or a right of pre-emption is not clearly laid down in the cases, but it is submitted that an option exists when an instrument on its true construction constitutes a present offer to sell irrevocable for a specified period or until the happening of a specified event, or for a reasonable period, and notwithstanding that it is exercisable only after the happening of some future certain event: see *Mackay v Wilson* (1947) 47 SRNSW 315 at 325; *Pritchard v Briggs* [1980] Ch 338 at 418, [1980] 1 All ER 294 at 329, CA; *Imperial Chemical Industries Ltd v Sussman* (1976) 28 May (unreported, but referred to in *Pritchard v Briggs* supra at 392 and at 307); and see PARA 1037 note 8 ante.

A feature which appears to signify a right of pre-emption is the ability of the grantor of the right to prevent the occurrence of the event on the happening of which an obligation to offer for sale or a right to purchase is to arise (see *Pritchard v Briggs* supra at 418, 422 and at 329, 332), but this is not an essential characteristic of such a right. See Forms and Precedents. Cf Barnsley's Land Options (2nd Edn) 184.

2 See *Pritchard v Briggs* [1980] Ch 338, [1980] 1 All ER 294, CA, where it was held that a right of pre-emption is not an interest in land; revsg [1980] Ch 338, [1978] 1 All ER 886; applying and explaining *London and South Western Rly Co v Gomm* (1882) 20 ChD 562, CA; *Manchester Ship Canal Co v Manchester Racecourse Co* [1901] 2 Ch 37, CA; *Mackay v Wilson* (1947) 47 SRNSW 315; and approving *Murray v Two Strokes Ltd* [1973] 3 All ER 357, [1973] 1 WLR 823; *Imperial Chemical Industries Ltd v Sussman* (1976) 28 May (unreported, but referred to in *Pritchard v Briggs* supra at 392 and at 307). The Perpetuities and Accumulations Act 1964 s 9 (2) proviso (see PARA 1037 note 16 ante), which provides that s 9 (2) is not to apply, is otiose: see PARA 1037 text and note 16 ante; and see note 1 supra. The extent to which the position is affected by s 10 is not clear; the wording of the section is ambivalent. As a matter of principle it is submitted that the rule ought not to apply to dispositions not capable of binding third persons, but see further PARA 1036 text and note 16 ante.

3 See *Pritchard v Briggs* [1980] Ch 338 at 396, 418, [1980] 1 All ER 294 at 311, 329, CA. As to the right of pre-emption of superfluous land which has been compulsorily acquired see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 905. See also *Manchester Ship Canal Co v Manchester Racecourse Co* [1900] 2 Ch 352; affd [1901] 2 Ch 37, CA.

4 *Re Rosher, Rosher v Rosher* (1884) 26 ChD 801, followed in *Re Cockerill, Mackaness v Percival* [1929] 2 Ch 131; and see *Caldy Manor Estate Ltd v Farrell* [1974] 3 All ER 753, [1974] 1 WLR 1303, CA. Cf *Re Dugdale, Dugdale v Dugdale* (1888) 38 ChD 176. See also GIFTS vol 52 (2009) PARA 254.

5 *London and South Western Rly Co v Gomm* (1882) 20 ChD 562; *Trevelyan v Trevelyan* (1885) 53 LT 853.

6 *Re Tyrrell's Estate* [1907] 1 IR 292, Ir CA, overruling *Switzer & Co v Rochford* [1906] 1 IR 399; and see *Re Earl of Donoughmore's Estate* [1911] 1 IR 211 (redemption of rentcharges); *Duke of Northumberland v Percy* [1893] 1 Ch 298 (where the power to redeem was in fact severable).

7 *District Land Registrar v Kauri Timber Co* (1902) 22 NZLR 260 (NZ CA).

8 As to mortgages see PARA 1006 ante, 1116 post; and see MORTGAGE vol 77 (2010) PARA 317. As to sinking funds see Gray's Rule against Perpetuities (4th Edn) s 571.1.

UPDATE

1038 Rights of pre-emption and repurchase

NOTES 1-3--As to the status of pre-emption rights following the enactment of the Land Registration Act 2002 s 115, see LAND REGISTRATION vol 26 (2004 Reissue) PARA 939 NOTE 3.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(2) INTERESTS SUBJECT TO THE RULE/(iv) Interests under Contracts/1039. Covenants to grant or renew leases.

1039. Covenants to grant or renew leases.

An option to renew conferred on a tenant by a lease runs with the land and the reversion¹, and unlike an option to purchase the reversion² is not subject to the rule against perpetuities³, even if the new lease is not to be in terms similar to the original one⁴. The statutory provisions invalidating a contract to create a reversionary lease to take effect more than 21 years after the date of the contract⁵ or a contract to renew a lease for a term exceeding 60 years⁶, and the statutory provisions whereby a contract for the grant of a perpetually renewable lease operates as an agreement for a demise for 2,000 years, are dealt with elsewhere⁷. A covenant by an underlessor that, if he obtains from the freeholder a further term, he will grant a new lease for

an extended term to the underlessee, is not a covenant for renewal and does not run with the land⁸.

Covenants or contracts to renew leases in favour of persons not parties to any existing lease and not having any privity of estate with the grantor do not run with the land and are subject to the rule against perpetuities and, therefore, if the grant is to be at too remote a period, or the term of the lease cannot be ascertained until too remote a period, the interest in the land created by the covenant is void⁹. In relation to instruments taking effect on or after 16 July 1964, the disposition may, however, be saved if the grant is in fact made or the term ascertained within the perpetuity period under the Perpetuities and Accumulations Act 1964¹⁰.

1 See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 139. As to the exception from the rule against perpetuities of covenants running with the land see PARA 1006 ante.

2 See PARA 1037 ante. As to instruments taking effect after the Perpetuities and Accumulations Act 1964 see s 9 and PARA 1037 ante.

3 *Hare v Burges* (1857) 4 KG & J 45 at 57; *Pollock v Booth* (1875) IR 9 Eq 229 (affd 9 IR Eq 607, Ir CA); *Muller v Trafford* [1901] 1 Ch 54 at 61; *Woodall v Clifton* [1905] 2 Ch 257 at 263, CA per Warrington J; *Rider v Ford* [1923] 1 Ch 541; and see *Re Tyrrell's Estate* [1907] 1 IR 292 at 298, Ir CA; *London and South Western Rly Co v Gomm* (1882) 20 ChD 562 at 579, CA; *Bridges v Hitchcock* (1715) 5 Bro Parl Cas 6, HL. See also *Weg Motors Ltd v Hales* [1962] Ch 49 at 71, 72, [1961] 3 All ER 181 at 188, 189, CA; affg [1961] Ch 176, [1960] 3 All ER 762.

4 *Rider v Ford* [1923] 1 Ch 541 at 547.

5 See the Law of Property Act 1925 s 149 (3); and see *Re Strand and Savoy Properties Ltd, D P Development Co Ltd v Cumbrae Properties Ltd* [1960] Ch 582, [1960] 2 All ER 327 (statutory provision does not invalidate an option for renewal more than 21 years after the date of the original lease containing the option, if the new lease, when granted, will take effect within 21 years of the grant); and see *Weg Motors Ltd v Hales* [1962] Ch 49, [1961] 3 All ER 181, CA. An option to renew is not a 'contract' for the purposes of the Law of Property Act 1925 s 149 (3): see *Weg Motors Ltd v Hales* supra at 68, 78 and at 186, 192. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 106, 237.

6 See the Law of Property Act 1922 s 145, Sch 15 para 7 (2) and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 140, 538.

7 See ibid Sch 15 para 7 (1) and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 541.

8 *Muller v Trafford* [1901] 1 Ch 54. See also *Coronation Street Industrial Properties Ltd v Ingall Industries plc* [1989] 1 All ER 979, [1989] 1 WLR 304, HL.

9 *Hope v Gloucester Corpn* (1855) 7 De GM & G 647; *Redington v Browne* (1893) 32 LR Ir 347; and see *A-G v Greenhill* (1863) 33 Beav 193; *A-G v Master and Fellows of Catherine Hall, Cambridge* (1820) Jac 381 at 395 (a devise, with a condition that the rent should remain unaltered).

10 See the Perpetuities and Accumulations Act 1964 s 3 (1) and PARA 1009 ante. As to the perpetuity period in relation to options see s 9 (2) and PARA 1037 ante; and as to the period generally see ss 1, 3 (4) and PARAS 1010, 1011 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(2) INTERESTS SUBJECT TO THE RULE/(v) Determinable Interests; Possibilities of Reverter or Resulting Trusts/1040. Possibilities of reverter, conditions subsequent, exceptions and reservations.

(v) Determinable Interests; Possibilities of Reverter or Resulting Trusts

1040. Possibilities of reverter, conditions subsequent, exceptions and reservations.

Where the Perpetuities and Accumulations Act 1964 applies¹, in the case of:

- 31 (1) a possibility of reverter on the determination of a determinable fee simple²;
or
- 32 (2) a possibility of a resulting trust³ on the determination of any other determinable interest in property⁴,

the rule against perpetuities applies in relation to the provision causing the interest to be determinable as it would apply if that provision were expressed in the form of a condition subsequent⁵ giving rise, on its breach, to a right of re-entry or an equivalent right in the case of property other than land, and, where the provision falls to be treated as void for remoteness, the determinable interest becomes an absolute interest⁶.

Where a disposition⁷ is subject to any such provision, or to any such condition subsequent, or to any exception or reservation, the disposition is to be treated for the purposes of the 1964 Act as including a separate disposition of any rights arising by virtue of the provision, condition subsequent, exception or reservation⁸.

1 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

2 Ibid s 12 (1) (a).

3 Resulting trusts in personalty analogous to possibilities of reverter in land were thought to be outside the rule at common law: see the Fourth Report of the Law Reform Committee (1956) (Cmnd 18) PARA 41. The Perpetuities and Accumulations Act 1964 s 12 is not, however, in terms confined to trusts analogous to possibilities of reverter and has been criticised on that account: see Elphinstone's Perpetuities and Accumulations Act 1964 pp 39, 40.

4 Perpetuities and Accumulations Act 1964 s 12 (1) (b).

5 At common law a right of entry on condition broken in relation to a fee simple subject to a condition subsequent was within the rule: see eg *Re Hollis' Hospital Trustees and Hague's Contract* [1899] 2 Ch 540; and see the Law of Property Act 1925 s 4 (3), giving statutory effect to the point.

6 Perpetuities and Accumulations Act 1964 s 12 (1). The 'wait and see' rule (see PARA 1009 ante) is applicable. Thus a provision for reverter will be treated as valid until such time as it becomes established that the determining event cannot happen within the perpetuity period. If the event does occur within the period, the reverter takes effect; if it becomes established that it cannot so occur, the possibility of reverter is extinguished and the determinable interest becomes absolute.

7 For the meaning of 'disposition' see PARA 1009 note 1 ante. The Perpetuities and Accumulations Act 1964 applies to 'dispositions': see ss 3, 6, 9 and PARAS 1009, 1037 ante, 1088 post. It seems clear that the perpetuity period is to be measured by reference to the determinable interest and not the disposition expectant upon its determination. Thus, only lives in being applicable to the initial determinable gift can be used.

8 Ibid s 12 (2). Only measuring lives relevant to the initial determinable interest can be used to calculate the perpetuity period; rights arising on the happening of the determining event are to be treated as arising by virtue of a separate disposition. Thus, in a gift to an old people's home until it ceases to exist and then to X, the provision for a gift to X is treated as a condition subsequent which is valid until it becomes established that the old people's home cannot cease to exist for more than 21 years; there are no measuring lives in relation to the gift to the home, and X's life does not count: see Megarry and Wade's Law of Real Property (5th Edn) 278, 279; Maudsley's Modern Law of Perpetuities 191.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(i) Particular Interests excepted from the Rule/1041. Interests in foreign property.

(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY

(i) Particular Interests excepted from the Rule

1041. Interests in foreign property.

The rule against perpetuities does not apply to immovable estate in Scotland or foreign countries, or to funds bequeathed on trust to invest them in the purchase of immovable estates in Scotland or abroad, limited or to be settled in a manner valid by the law of the place where they are situated, although invalid by English law¹.

¹ *Fordyce v Bridges* (1848) 2 Ph 497. Cf para 1025 ante. It is thought that, where a testator bequeaths a trust of movable property situated and to be administered in a country other than that of his last domicile and which is valid under the law of the place of administration but void for perpetuity under the law of the domicile, the former law prevails: see Cheshire and North's Private International Law (12th Edn) 845. Cf Dicey and Morris' Conflict of Laws (11th Edn) 1019; and see Morris and Leach's Rule against Perpetuities (2nd Edn) 22, 23.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(i) Particular Interests excepted from the Rule/1042. Future goods.

1042. Future goods.

The rule against perpetuities has never applied to assignments of future goods¹ the property in which at law passes on appropriation, which may take place at a possibly remote period². A present sale of such goods operates merely as an agreement for sale³.

¹ For the meaning of 'future goods' for the purposes of the Sale of Goods Act 1979 see s 5(1) and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 47.

² See eg *Clements v Matthews* (1883) 11 QBD 808, CA and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 128. Until appropriation the grantee has only an equitable interest: *Joseph v Lyons* (1884) 15 QBD 280, CA; *Hallas v Robinson* (1885) 15 QBD 288, CA. See further PERSONAL PROPERTY vol 35 (Reissue) PARA 1265 post; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 128, 156.

³ See the Sale of Goods Act 1979 s 5(3) and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 48.

UPDATE

1042 Future goods

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(i) Particular Interests excepted from the Rule/1043. Statutory exceptions.

1043. Statutory exceptions.

There are certain interests which by statute have been specifically excepted from the rule against perpetuities, either for removing doubts¹, or for reasons of public policy².

1 As to remedies given by way of indemnity against rentcharges see the Law of Property Act 1925 s 162 and PARA 1006 ante; as to remedies in relation to rentcharges see also ss 4 (3), 121 (6), 190 (8) and PARAS 1006, 1029 ante; and as to the validation of certain gifts depending on the attainment of an age exceeding 21 years see s 163 (repealed in relation to instruments taking effect on or after 16 July 1964: see PARA 1009 note 2 ante).

2 See eg the Social Security Act 1973 s 69 (as amended) (personal and occupational pension schemes) and PARA 1044 post. As to options to purchase see the Perpetuities and Accumulations Act 1964 s 9 and PARA 1037 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(i) Particular Interests excepted from the Rule/1044. Personal and occupational pension schemes.

1044. Personal and occupational pension schemes.

The Social Security Act 1973 provides¹ that, at any time when a personal² or occupational³ pension scheme qualifies under that Act⁴, it is exempt from the operation of any rules of law relating to perpetuities which would otherwise invalidate, or might be taken to invalidate, any of the trusts of the scheme or any disposition made under it or for its purposes (whether trusts created, or dispositions made, before or after the scheme first qualified under that Act)⁵.

A public service pension scheme⁶ qualifies under the statutory provisions at all times⁷. Otherwise, a scheme qualifies at any time when:

- 33 (1) it is contracted-out⁸ or an appropriate scheme under Part I of the Social Security Act 1986⁹ in relation to any employment¹⁰; or
- 34 (2) it satisfies the requirements of regulations¹¹ under the statutory provisions¹².

As respects the operation of the rules of law relating to perpetuities, the statutory provisions do not validate with retrospective effect any trusts created or dispositions made under or for the purpose of a scheme if (taking into account, where applicable, the 'wait and see' provisions of the Perpetuities and Accumulations Act 1964¹³) those trusts or dispositions were already required to be treated as void under the rules before the scheme qualified¹⁴. If a scheme ceases to qualify, trusts so created and dispositions so made are then again to be subject to the rules as if the scheme had never qualified, but without prejudice to any rights which vested during the period of qualification¹⁵.

1 See the Social Security Act 1973 s 69 (as amended): see *infra*. The Superannuation and other Trust Funds (Validation) Act 1927 (power to register superannuation schemes, with consequent exemption from the rule against perpetuities), with certain exceptions, ceases to have effect as from a date to be appointed by order (see the Social Security Act 1973 ss 69 (7) (a), 100 (2) (b), 101 (2), Sch 28 Pt I), but at the date at which this volume states the law no such order had been made. Regulations may, however, provide, in relation to a scheme whose fund was registered under the Superannuation and other Trust Funds (Validation) Act 1927 immediately before its repeal takes effect, for the scheme to retain the benefit of that Act, subject to prescribed conditions and either indefinitely or for a prescribed period: Social Security Act 1973 s 69 (7) (which comes into operation on a date to be appointed by order: see *supra*), but at the date at which this volume states the law no such conditions had been prescribed. Until its repeal the Superannuation and other Trust Funds (Validation) Act 1927 has effect with the following modifications: (1) no new application is to be made under s 3 for the registration of any fund (without prejudice to the effectiveness of any application previously made or pending); and (2) the registration of a fund may be cancelled notwithstanding that the fund has not been wound up, if the trustees apply in writing to the registrar stating that they desire its cancellation: Social Security Act 1973 s 69 (8).

2 For these purposes, 'personal pension scheme' means any scheme or arrangement which is comprised in one or more instruments or agreements, and which has, or is capable of having, effect so as to provide benefits, in the form of pensions or otherwise, payable on death or retirement to or in respect of employed earners who have made arrangements with the trustees or managers of the scheme for them to become members of the scheme: Social Security Act 1986 s 84 (1) (applied by the Social Security Act 1973 s 99 (1) (amended by the Social Security Act 1986 s 86 (1), Sch 10 para 8)).

3 For these purposes, 'occupational pension scheme' means any scheme or arrangement which is comprised in one or more instruments or agreements and which has, or is capable of having, effect in relation to one or more descriptions or categories of employment so as to provide benefits, in the form of pensions or otherwise, payable on termination of service, or on death or retirement, to or in respect of earners with qualifying service in an employment of any such description or category: Social Security Act 1973 ss 51 (3) (a), 99 (1); and see SOCIAL SECURITY AND PENSIONS. For the meaning of 'employment' see note 10 infra.

4 Ie under *ibid* s 69: see *infra*.

5 *Ibid* s 69 (1).

6 For these purposes, 'public service pension scheme' means an occupational pension scheme established by or under an enactment or the Royal prerogative or a Royal charter, being a scheme (1) all the particulars of which are set out in, or in a legislative instrument made under, an enactment, Royal warrant or charter; or (2) which cannot come into force, or be amended, without the scheme or amendment being approved by a Minister of the Crown or government department, and includes any occupational pension scheme established, with the concurrence of the Minister for the Civil Service, by or with the approval of another Minister of the Crown and any occupational pension scheme prescribed by regulations made by the Secretary of State and the Minister for the Civil Service jointly as being a scheme which ought in their opinion to be treated as a public service pension scheme for the purposes of *ibid* Pt II (ss 51-72) (as amended), dealing with occupational pension schemes: s 51 (3) (b) (amended by the Social Security Act 1980 s 4 (1)).

7 Social Security Act 1973 s 69 (2).

8 Ie under the provisions of *ibid* Pt II (ss 51-72) (as amended) dealing with occupational pension schemes: see SOCIAL SECURITY AND PENSIONS.

9 Ie the Social Security Act 1986 Pt I (ss 1-17A) (as amended): see SOCIAL SECURITY AND PENSIONS.

10 Social Security Act 1973 s 69 (2) (a) (amended by the Social Security Pensions Act 1975 s 65 (1), Sch 4 para 28; the Social Security Act 1986 Sch 10 para 6). For these purposes, 'employment' includes any trade, business, profession, office or vocation: Social Security Act 1973 s 99 (1).

11 The regulations may require a scheme (1) to contain provisions in any prescribed form, or to any prescribed effect; or (2) to have, or to be such that it may be expected to qualify for, tax exemption or tax approval; and the regulations may also be so framed that, in prescribed circumstances, the requirements can be treated as satisfied if application has been duly made to the Inland Revenue with a view to obtaining tax approval for the scheme: *ibid* ss 69 (3), 99 (1). 'Tax exemption' and 'tax approval' mean respectively exemption from tax and approval of the Inland Revenue in either case under any such provision of the Income Tax Acts as may be prescribed by regulations: Social Security Act 1973 ss 69 (4), 99 (1). Regulations may include provision by which a scheme which ceases, if it is an occupational pension scheme, to be contracted out or, if it is a personal pension scheme, to be an appropriate scheme, or ceases to satisfy the requirements of the regulations under s 69 (2) (as amended) (see *supra*), may nevertheless be treated as continuing to qualify under these provisions for a further period of two years from the cesser, or for such longer period as the Occupational Pensions Board considers to be reasonable in the case of a particular scheme: s 69 (5) (amended by the Social Security Pensions Act 1975 Sch 4 para 28; the Social Security Act 1986 Sch 10 para 6). As to schemes which qualify for exemption see the Personal and Occupational Pension Schemes (Perpetuities) Regulations 1990, SI 1990/1143, regs 3, 4. As to the extension of the period of qualification see reg 5.

12 Social Security Act 1973 s 69 (2) (b).

13 Ie the provisions of the Perpetuities and Accumulations Act 1964 s 3 (1): see PARA 1009 ante. See also *Re Flavel's Will Trusts*, *Coleman v Flavel* [1969] 2 All ER 232, [1969] 1 WLR 444; *Re Thomas Meadows & Co Ltd and Subsidiary Companies (1960) Staff Pension Scheme Rules*, *Fetherston v Thomas Meadows & Co Ltd* [1971] Ch 278, [1971] 1 All ER 239.

14 Social Security Act 1973 s 69 (6) (a).

15 *Ibid* s 69 (6) (b).

UPDATE**1044 Personal and occupational pension schemes**

NOTE 1--Superannuation and other Trust Funds (Validation) Act 1927 s 3 amended: Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649.

NOTE 11--SI 1990/1143 reg 3 amended: SI 2001/943.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(i) Particular Interests excepted from the Rule/1045. Present perpetual interests and vested interests.

1045. Present perpetual interests and vested interests.

Certain perpetual interests are sometimes described as exceptions to the rule against perpetuities. It is perhaps more correct to say that, when they are created as present interests, the rule has no application to them¹. Examples of such interests are easements and profits à prendre², rentcharges and other interests in land lasting indefinitely and all remedies to enforce them, covenants and conditions binding land at law³ or in equity⁴, customary rights, interests conferred on charities and interests held by corporations⁵.

All vested⁶ interests are also outside the rule, even where they may come into possession at some time in the future beyond the perpetuity period⁷.

1 As to exceptions arising from the law of the place where the property is situated see PARA 1041 ante.

2 As to such interests see PARA 1006 ante.

3 As to covenants to renew leases see PARA 1039 ante.

4 See PARA 1006 ante.

5 See PARA 1006 ante. As to future gifts to charities see PARAS 1055, 1056 post.

6 For the meaning of 'vested' see PARA 1019 ante.

7 Eg vested remainders and reversions. As to such interests see REAL PROPERTY vol 39(2) (Reissue) PARA 162 et seq.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(i) Particular Interests excepted from the Rule/1046. Powers.

1046. Powers.

Certain exceptions to the application of the rule against perpetuities which exist in the case of general powers of appointment¹, powers limited to take effect on the failure of issue in tail², and powers to raise money for the payment of debts³ are mentioned subsequently. Powers of administration in relation to any property are now also excepted from the rule⁴.

- 1 See PARAS 1091, 1096 post.
- 2 See PARA 1049 text and note 4 and PARA 1051 post.
- 3 See PARA 1091 post.
- 4 See the Perpetuities and Accumulations Act 1964 s 8 and PARA 1034 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(ii) Certain Destructible Interests/A. IN GENERAL/1047. Interest destructible by owner of another estate.

(ii) Certain Destructible Interests

A. IN GENERAL

1047. Interest destructible by owner of another estate.

Certain estates or interests which would otherwise be too remote are not considered as such, on account of their destructibility at the will of the owner of another estate to whom the right to destroy them is given by operation of law¹.

¹ See Lewis's Law of Perpetuity 164 (meaning of 'perpetuity': see PARA 1008 note 2 ante), explained in *Re Ashforth, Sibley v Ashforth* [1905] 1 Ch 535 at 541, 544 per Farwell J, by reference to remainders after an estate tail. As to mortgages see PARA 1006 ante, 1116 post.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(ii) Certain Destructible Interests/A. IN GENERAL/1048. Interest destructible by owner of interest.

1048. Interest destructible by owner of interest.

The mere fact of destructibility by the owner himself is not sufficient to prevent an estate or interest from being too remote¹. A right in a living person to an interest which may vest at a time beyond the legal limit is not made valid by the fact that the person in whose favour it is made may release it².

¹ *Cochrane v Cochrane* (1883) 11 LR Ir 361 at 368, criticised in Gray's Rule against Perpetuities (4th Edn) s 467. Cf Morris and Leach's Rule against Perpetuities (2nd Edn) 198 note 11.

² *Re Hargreaves, Midgley v Tatley* (1889) 43 ChD 401, CA. See also *London and South Western Rly Co v Gomm* (1882) 20 ChD 562 at 572, CA per Kay J; 1 Sanders on Uses and Trusts (5th Edn) 203, 204. *Avern v Lloyd* (1868) LR 5 Eq 383 and *Birmingham Canal Co v Cartwright* (1879) 11 ChD 421 must be considered overruled, as must also the remarks of Lord Brougham LC in *Keppell v Bailey* (1834) 2 My & K 517 at 527, in so far as they depend on the contrary principle; cf Challis's Law of Real Property (3rd Edn) 184, 185. The fact that an equity may be eliminated by purchase for value without notice cannot affect the question of remoteness: *London and South Western Rly Co v Gomm* supra at 579 per Jessel MR. As to the 'wait and see' rule in relation to instruments taking effect on or after 16 July 1964 (the commencement date of the Perpetuities and Accumulations Act 1964) see s 3 (1) and PARA 1009 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(ii) Certain Destructible Interests/B. LIMITATIONS DEFEASIBLE BY DISENTAIL AND TRUSTS DEFEASIBLE BY BENEFICIARIES/1049. Limitations on determination of estate tail which are not too remote.

B. LIMITATIONS DEFEASIBLE BY DISENTAIL AND TRUSTS DEFEASIBLE BY BENEFICIARIES

1049. Limitations on determination of estate tail which are not too remote.

Limitations taking effect on the determination or in defeasance of an estate tail, itself validly created, are not considered too remote, because of the right of the tenant in tail at common law, and now by statute¹, to destroy those limitations by barring the entail².

Accordingly, a charge of a specific sum³, a power of appointment⁴ and a term of years to secure contingent legacies⁵, to arise, upon the contingency of failure of issue in tail, in favour of persons ascertainable on or before such failure of issue, are valid. Similarly, a gift may be made to a class of issue to be ascertained at the determination of the estate tail, whether the gift is direct, or is to a trustee for the class, or upon trust to sell and divide the produce among the class⁶.

Limitations in defeasance of an estate tail, which in their nature must take effect during the continuance of the estate tail, need not be confined to any limit of time; name and arms clauses and shifting clauses operating on the succession to family estates are valid even if extended to all the issue in tail⁷.

The immunity only applies, however, to such limitations as can be barred by a tenant in tail; estates and interests prior to the estate tail and estates not arising on the determination or in defeasance of the estate tail⁸ are not protected from becoming void under the rule against perpetuities⁹.

1 Fines and Recoveries Act 1833 s 15; Law of Property Act 1925 s 130 (1); and see REAL PROPERTY vol 39(2) (Reissue) PARA 123.

2 *Nicolls v Sheffield* (1787) 2 Bro CC 215; *Heasman v Pearse* (1871) 7 Ch App 275; *Van Grutten v Foxwell*, *Foxwell v Van Grutten* [1897] AC 658 at 679, HL per Lord Macnaghten. See also *Re Bellew, O'Reilly v Bellew* [1924] 1 IR 1, Ir CA (sale in defeasance of an estate tail); Lewis's Law of Perpetuity 664; and see *Jack d Westby v Fetherstone* (1829) 2 Hud & B 320; *Cole v Sewell* (1848) 2 HL Cas 186 (where limitations in general default of issue took effect as contingent remainders after estates tail and were not too remote). The barrable nature of estates tail renders them free from objection notwithstanding the possible minority of tenants in tail: *Re Earl of Stamford and Warrington, Payne v Grey* [1912] 1 Ch 343 at 355, 366, CA. As to entailed interests generally see REAL PROPERTY vol 39(2) (Reissue) PARA 117 et seq.

3 *Faulkner v Daniel* (1843) 3 Hare 199.

4 *Earl of Bandon v Moreland* [1910] 1 IR 220 at 227.

5 *Goodwin v Clark* (1661) 1 Lev 35; *Morse v Marquis of Ormonde* (1820) 5 Madd 99 (affd (1826) 1 Russ 382).

6 *Heasman v Pearse* (1871) 7 Ch App 275 at 282, 283 per James LJ. See also *Doe d Winter v Perratt* (1843) 9 Cl & Fin 606, HL; *Goodier v Edmunds* [1893] 3 Ch 455 at 462 per Stirling J; *Re Haygarth, Wickham v Holmes* [1912] 1 Ch 510 at 518; *Kilroy and Callan v Parker and McGauran* [1966] IR 309 at 321.

7 *St George v St George* (1767) Gilbert's Law of Uses and Trusts (3rd Edn) by Sugden 157, HL; *Nicolls v Sheffield* (1787) 2 Bro CC 215; *Doe d Heneage v Heneage* (1790) 4 Term Rep 13; *Carr v Earl of Erroll* (1805) 6 East 59; *Harrison v Round* (1852) 2 De GM & G 190 at 201; *Re Earl of Stamford and Warrington, Payne v Grey*

[1912] 1 Ch 343 at 363, CA. Cf *Stanley v Stanley* (1809) 16 Ves 491; *Bennett v Bennett* (1864) 2 Drew & Sm 266; *Re Fry, Reynolds v Denne* [1945] Ch 348, [1945] 2 All ER 205. The ruling of Vaisey J in *Re Fry, Reynolds v Denne* supra, that it was contrary to public policy to impose a name and arms clause on a woman, was overruled in *Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643, [1962] 2 All ER 335, CA. It was at one time the practice to confine these clauses within lives in being: see Co Litt 327a, Butler's note.

8 As to the effect of a disentail see the Fines and Recoveries Act 1833 s 15 and REAL PROPERTY vol 39(2) (Reissue) PARA 123.

9 *Case v Drosier* (1837) 2 Keen 764 (affd (1839) 5 My & Cr 246); *Scarisbrick v Skelmersdale* (1850) 17 Sim 187; *Floyer v Bankes* (1869) LR 8 Eq 115; *Sykes v Sykes* (1871) LR 13 Eq 56. The decision in *Sykes v Sykes* supra has been criticised: see Gray's Rule against Perpetuities (4th Edn) ss 469-472. See, however, Jarman on Wills (8th Edn) 325 note (q), and Morris and Leach's Rule against Perpetuities (2nd Edn) 197, 198.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(ii) Certain Destructible Interests/B. LIMITATIONS DEFEASIBLE BY DISENTAIL AND TRUSTS DEFEASIBLE BY BENEFICIARIES/1050. Limitations which are too remote.

1050. Limitations which are too remote.

Limitations which cannot vest until a time after the natural determination of the estate tail, or are to vest on a possibly remote contingent event which may not happen during the continuance of the estate tail and operate in defeasance of it, are not protected¹. A limitation after an estate in tail female or in tail male, on general failure of issue of the progenitor of the issue in tail, is void², except where it formerly was, and would take effect as, a valid legal contingent remainder³. In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies⁴, a limitation may, however, be valid under the 'wait and see' rule even if it is capable of vesting outside the perpetuity period⁵.

1 Lewis's Law of Perpetuity 669; 1 Powell's Devises (3rd Edn) 408; Marsden's Rule against Perpetuities 147; Morris and Leach's Rule against Perpetuities (2nd Edn) 195, 196. See also *Hartopp v Lord Carbery* (1819) cited in 1 Sanders on Uses and Trusts (5th Edn) 204, 205, where there was a limitation by way of use to arise after failure of issue not taking any estate in the settled property. Lewis's Law of Perpetuity 670 gives, as an example of the first kind of limitation mentioned supra, one to A and the heirs of his body and, after the expiration of two years from failure of the issue of A, to B and his heirs. With regard to the second kind of limitation, doubts have been expressed whether these limitations are wholly invalid, or invalid only so far as they may be capable of arising after the determination of the estate tail. It is contended by those who take the latter view that the limitations might take effect as an executory limitation of the fee simple in the event of the happening of the contingency prior to the exhaustion of the estate tail without the estate tail being barred: Lewis's Law of Perpetuity 672; Marsden's Rule against Perpetuities 147. In *Re Haygarth, Wickham v Holmes* [1912] 1 Ch 510 the vesting of the limitation was confined to a proper period.

2 *Bristow v Boothby* (1826) 2 Sim & St 465 (affd (1829) per Lord Lyndhurst LC: see *Ellicombe v Gompertz* (1837) 3 My & Cr 127 at 151). Most of the cases of this class have been cases of devises by will of a reversion expectant upon an estate tail to which a testator was entitled under his marriage settlement or other instrument. In such cases, where the devise is expressed to take effect upon failure of issue, it is bad for remoteness unless the issue referred to in the devise can be construed to be the same as the issue capable of inheriting under the entail. The court leans to that construction, but it is a question of construction in every case. The issue contemplated by the devise and the entail were held to be the same in *Badger v Lloyd* (1699) 1 Ld Raym 523 (affd (1701) 1 Ld Raym 527, HL); *Lytton v Lytton* (1793) 4 Bro CC 441; *Egerton v Jones* (1830) 3 Sim 409; *Eno v Eno* (1847) 6 Hare 171; *Lewis v Templer* (1864) 33 Beav 625. Cf *Morse v Lord Ormonde* (1826) 1 Russ 382 (a remainder); *Sanford v Irby* (1820) 3 B & Ald 654; *Ellicombe v Gompertz* (1837) 3 My & Cr 127. In the following cases it was held that the issue contemplated in the devise were not the same as the issue capable of inheriting under the entail, and the devises were consequently bad for remoteness: *Lady Lanesborough v Fox* (1733) Cas temp Talb 262, HL; *Jones v Morgan* (1774) 3 Bro Parl Cas 323, HL; *Bankes v Holme* (1821) 1 Russ 394n, HL. As to estates tail implied from gifts over on failure of issue see WILLS vol 50 (2005 Reissue) PARA 760; and see Williams on Wills (6th Edn) 646.

3 See PARA 1028 ante.

4 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

5 See *ibid* s 3 (1) and PARA 1009 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(ii) Certain Destructible Interests/B. LIMITATIONS DEFEASIBLE BY DISENTAIL AND TRUSTS DEFEASIBLE BY BENEFICIARIES/1051. Trusts and powers given on strict settlement.

1051. Trusts and powers given on strict settlement.

Similar considerations apply to trusts and powers given to trustees on a strict settlement of real estate. If these trusts and powers are barrable by a disentail, they may be limited to continue throughout the estate tail and to be exercised on the failure of issue in tail¹. Trusts and powers which, although limited after an estate tail, are annexed to unbarrable prior limitations must, however, be confined to the perpetuity period. Thus a clause providing for entry and receipt of rents by trustees during the minority of equitable tenants in tail which takes effect by virtue of an implied estate anterior to that of the tenants in tail² is invalid unless so confined³. The destination of the fund derived under the trust is immaterial⁴. A similar principle has been held to apply to a power to cut timber attempted to be conferred on the trustees of a settlement⁵.

1 *Biddle v Perkins* (1829) 4 Sim 135; *Waring v Coventry* (1833) 1 My & K 249; *Wallis v Freestone* (1839) 10 Sim 225; *Cole v Sewell* (1843) 4 Dr & War 1 at 32 (on appeal (1848) 2 HL Cas 186); *Briggs v Earl of Oxford* (1852) 1 De GM & G 363; *Lantsbery v Collier* (1856) 2 K & J 709; *Re Earl of Stamford and Warrington, Payne v Grey* [1912] 1 Ch 343, CA. See also PARA 1049 text and note 2 ante; and see Morris and Leach's Rule against Perpetuities (2nd Edn) 234.

2 See *Marshall v Holloway* (1820) 2 Swan 432; *Re Earl of Stamford and Warrington, Payne v Grey* [1911] 1 Ch 255 at 267 per Warrington J; *revsd* [1912] 1 Ch 343, CA (see note 3 *infra*).

3 *Lade v Holford* (1763) 1 Wm Bl 428 (see Gray's Rule against Perpetuities (4th Edn) s 464 note (2)); *Browne v Stoughton* (1846) 14 Sim 369; *Turvin v Newcome* (1856) 3 K & J 16; *Re Earl of Stamford and Warrington, Payne v Grey* [1911] 1 Ch 255; *revsd* [1912] 1 Ch 343, CA, on the ground that no legal estate in the trustees anterior to the estate tail was to be implied in that case. See also Lewis's Law of Perpetuity, Supplement 176; Gray's Rule against Perpetuities (4th Edn) ss 372, 467, 468; 3 Jur NS, Pt 2, 181; (1911) 27 LQR 156. In *Scarlsbrick v Skelmersdale* (1850) 17 Sim 187 (see Gray's Rule against Perpetuities (4th Edn) s 467 note (5)), and *Floyer v Bankes* (1869) LR 8 Eq 115, similar powers were attached to a term prior to the estate tail, and were held void. The question was not argued in *Crosse v Glennie* (1843) 2 Y & C Ch Cas 237: see Gray's Rule against Perpetuities (4th Edn) s 465. The statutory provisions relating to the management of land during minorities now contained in the Settled Land Act 1925 s 102 (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 54, 55) are not subject to the limit imposed by the rule against perpetuities: see PARA 1006 text and note 21 ante. They confer powers wider than could be created by deed or by will, as they extend over the minority of a tenant in tail by descent, whereas provisions in a deed or will so extending would ordinarily be void. Cf *Re Glover* [1899] 1 IR 337; *Re Cowley* [1901] 1 Ch 38.

4 *Browne v Stoughton* (1846) 14 Sim 369 at 378 per Shadwell V-C; *Re Earl of Stamford and Warrington, Payne v Grey* [1911] 1 Ch 255; *revsd* [1912] 1 Ch 343, CA (see note 3 *supra*). In *Marshall v Holloway* (1820) 2 Swan 432, Lord Eldon LC held that, although the destination of the accumulated fund was not too remote, being held on the same trusts as those of the testator's personal estate, which were valid, yet the gift of the accumulated fund was void because the accumulation which was a condition precedent to the gift might extend beyond the perpetuity period: see Gray's Rule against Perpetuities (4th Edn) s 674; Jarman on Wills (8th Edn) 323 note (h); Morris and Leach's Rule against Perpetuities 197, 198.

5 *Ferrand v Wilson* (1845) 4 Hare 344, criticised in Gray's Rule against Perpetuities (4th Edn) ss 501, 502. Cf *Briggs v Earl of Oxford* (1852) 1 De GM & G 363 (where the power was held to be capable of being barred: see PARA 1053 note 1 post). As to powers to make advances see PARA 1064 post. In so far as such a power falls within the Perpetuities and Accumulations Act 1964 s 8 (1), it is not to be invalidated by the rule against perpetuities: see s 8 (1) and PARA 1034 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(ii) Certain Destructible Interests/B. LIMITATIONS DEFEASIBLE BY DISENTAIL AND TRUSTS DEFEASIBLE BY BENEFICIARIES/1052. Trusts determinable by beneficiaries having vested interests.

1052. Trusts determinable by beneficiaries having vested interests.

A trust is determinable by beneficiaries, apart from disabilities on their part¹, when all the beneficial interests become vested². Accordingly a trust which is necessarily so determinable within the perpetuity period is not obnoxious to the rule on the ground that it may continue for an indefinite period³. A trust for accumulation for the benefit of a person whose interest is vested is such a trust⁴.

The contingency on which the trust arises must, however, be such as will necessarily occur within the perpetuity period⁵, and the mere possibility of the trust being determinable within that period is not sufficient⁶.

However, in relation to instruments to which the Perpetuities and Accumulations Act 1964 applies⁷, the 'wait and see' rule operates⁸.

1 Those disabilities are ignored in questions of perpetuity: see PARA 1019 note 2 ante.

2 See eg *King v Mullins* (1852) 1 Drew 308 and TRUSTS vol 48 (2007 Reissue) PARA 750.

3 *Silvester v Bradley* (1842) 13 Sim 75; *Oddie v Brown* (1859) 4 De G & J 179; *Longfield v Bantry* (1885) 15 LR Ir 101 at 137, citing *Clements v Earl of Leitrim* (unreported). As to trusts for sale see *Re Tweedie and Miles* (1884) 27 ChD 315; *Re Douglas and Powell's Contract* [1902] 2 Ch 296 at 313. A gift which is inconsistent with the perpetuity rule cannot, however, be saved on the broad ground that an indefinite gift of income entitles the donee to call for the corpus, if the true construction of the gift is inconsistent with an intention that the donee can call for capital: *Re Levy, Barclays Bank Ltd v Board of Guardians and Trustees for the Relief of the Jewish Poor* [1960] Ch 346 at 363, [1960] 1 All ER 42 at 50, CA. Cf *Re Beesty's Will Trusts, Farrar v Royal Alfred Merchant Seamen's Society* [1966] Ch 223, [1964] 3 All ER 82 (power to make disposition of capital).

4 Cf para 1069 note 9 and PARA 1120 post. In *Tregonwell v Sydenham* (1815) 3 Dow 194, HL, where a trust was declared of a term to accumulate the rents of an estate to raise a certain sum and from time to time to invest it in land to be settled upon certain beneficial trusts which were void for remoteness, the beneficial interest in the land purchased was held to result to the heir at law; but the term was held to be well created, and, apparently, the administrative trusts of the term also. For comment on this case see Sugden's Law of Property 326-330; Lewis's Law of Perpetuity 586-588; Gray's Rule against Perpetuities (4th Edn) ss 419-422. Cf *Smith v Cuninghame* (1884) 13 LR Ir 480.

5 See PARA 1032 ante.

6 *Cochrane v Cochrane* (1883) 11 LR Ir 361. See, however para 1048 note 1 ante.

7 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

8 See *ibid* s 3 (1) and PARA 1009 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(ii) Certain Destructible Interests/C. PROVISIONS FOR RAISING DEBTS AND INCUMBRANCES/1053. Trusts to pay debts.

C. PROVISIONS FOR RAISING DEBTS AND INCUMBRANCES

1053. Trusts to pay debts.

A trust of the income of any property to be accumulated or applied for the purpose of paying incumbrances or debts of the settlor or testator or of any other person, or any similar provision for such debts or incumbrances, where the accumulation for a period invalid under the rule against perpetuities is not made a condition precedent to the employment of the property for that purpose, is not invalid, even though it may last for an indefinite period¹. The same rule appears to apply to provisions for indemnity or exoneration².

A trust for payment of debts does not in general prevent the vesting of interests created subject to the trust³, and such interests will be vested in spite of a declaration that the beneficiaries are not to be entitled until the debts are paid⁴. Where, however, the directions of the will suspend all vesting indefinitely until payment of the debts or until the fund is equal to the debts, the interests so suspended are invalid⁵.

In a will provision may be made for payment of a legacy to an existing person or persons ascertainable within the perpetuity period by means of a trust for accumulation which may exceed the perpetuity period⁶, but not where the legacies are only contingently payable out of accumulations on a remote event⁷.

The statutory provisions by which the rule against perpetuities is not to operate to invalidate administrative powers of trustees or other persons have already been considered⁸.

1 *Lord Southampton v Marquis of Hertford* (1813) 2 Ves & B 54 at 65, followed in *Re Earl of Stamford and Warrington, Payne v Grey* [1912] 1 Ch 343 at 355, CA; *Bacon v Proctor* (1822) Turn & R 31 (where Graham B grounded his decision on the reason that the enjoyment, not the property, was tied up, and the estate vested in the same manner as if the testator had created a term for payment of his debts); *Bateman v Hotchkin* (1847) 10 Beav 426; and see *Earl of Stamford and Warrington, Payne v Grey* [1911] 1 Ch 255 at 276 (revsd [1912] 1 Ch 343, CA). In *Briggs v Earl of Oxford* (1852) 1 De GM & G 363, a power to cut timber and apply the proceeds towards payment of incumbrances was held good on the ground that it could be barred by the tenant in tail, and also, by Lord Cranworth LJ, on the ground that the contract between the parties that an incumbrance should be liquidated in a particular mode might extend over any time. The reason which is mostly understood for this exception from the application of the rule is that such trusts are not contrary to public policy and are destructible on payment of the debts by the beneficiaries entitled subject to them, whose interests are treated as vested: see *Tewart v Lawson* (1874) LR 18 Eq 490; *Norton v Johnstone* (1885) 30 ChD 649; *Re Earl of Stamford and Warrington, Payne v Grey* [1912] 1 Ch 343 at 368, CA. In *Scarlsbrick v Skelmersdale* (1850) 17 Sim 187, a trust for accumulation to pay debts was held void, the trust to pay debts out of the proceeds arising only at the end of the void period. As to the effect of a direction to accumulate for a period which may exceed the perpetuity period where the accumulation is not for the purpose of paying debts see PARA 1120 post; and as to the exemption of provisions for the payment of debts from the statutory restriction on accumulation see PARA 1132 post.

2 *Massy v O'Dell* (1859) 10 I Ch R 22. This case is doubted, however, in Gray's Rule against Perpetuities (4th Edn) s 417. In *Morland v Cook* (1868) LR 6 Eq 252, as explained in *Austerberry v Oldham Corp'n* (1885) 29 ChD 750, CA, a covenant made by co-owners on partition for repair of a sea wall and charging their respective parts of the expenses by way of rentcharge on the land allotted to them was held valid without discussion on the point of perpetuity. Cf *Halsall v Brizell* [1957] Ch 169, [1957] 1 All ER 371, where a covenant by landowners to pay expenses of maintaining roads, sewers and sea walls was said by Upjohn J, at 182 and at 377, to be void for perpetuity; and see *Tito v Waddell (No 2)*, *Tito v A-G* [1977] Ch 106 at 293, [1977] 3 All ER 129 at 283, 284. In *Cassamajor v Strode* (1821) Jac 630, a trust deed creating a rentcharge by way of indemnity against another rentcharge was also held valid without discussion of any question of perpetuity. As to statutory provisions confirming that the rule against perpetuities does not apply to indemnity rentcharges see PARA 1006 ante.

3 *Marshall v Holloway* (1820) 2 Swan 432 at 446 per Lord Eldon LC; *Bacon v Proctor* (1822) Turn & R 31; and see *Carter v Barnadiston* (1718) 1 P Wms 505, HL; *Bennett v Wyndham* (1857) 23 Beav 521.

4 *Tewart v Lawson* (1874) LR 18 Eq 490; cf *Strong v Teatt* (1760) 2 Burr 912 (estates declared in land unsold under trust for sale to pay debts) (affd 3 Bro Parl Cas 219, HL); *Collier v Walters* (1873) LR 17 Eq 252.

5 *Bagshaw v Spencer* (1748) 1 Ves Sen 142 at 143 per Lord Hardwicke LC; *Tewart v Lawson* (1874) LR 18 Eq 490 at 495 per Hall V-C (trust to raise funds equal in amount to debts); *Re Bewick, Ryle v Ryle* [1911] 1 Ch 116 (trust to pay debts); *Girard Trust Co v Russell* 179 F 446 (US 1910) (trust to raise funds equal in amount to debts of a state).

6 *Williams v Lewis* (1859) 6 HL Cas 1013; *Oddie v Brown* (1859) 4 De G & J 179. See also *Bateman v Hotchkin* (1847) 10 Beav 426.

7 *Smith v Cuninghame* (1884) 13 LR Ir 480, distinguishing *Williams v Lewis* (1859) 6 HL Cas 1013; *Oddie v Brown* (1859) 4 De G & J 179. In *Smith v Cuninghame* supra at 486, Chatterton V-C explains *Williams v Lewis* supra as being a case of 'nothing more than a charge of £600 and a term to secure it: which was clearly free from objection for remoteness'.

8 See the Perpetuities and Accumulations Act 1964 s 8 and PARA 1034 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(ii) Certain Destructible Interests/C. PROVISIONS FOR RAISING DEBTS AND INCUMBRANCES/1054. Accumulation for recoupment.

1054. Accumulation for recoupment.

If the debts or incumbrances are paid otherwise than under the trust for accumulation, as by the creditors enforcing against the estate their rights to be paid in a different way, or being paid off in administration by the court, any express or implied right in any beneficiary to have the estate administered and the accumulation continued, so as to recoup him, must be confined to the proper period¹.

1 As to such rights see *Tewart v Lawson* (1874) LR 18 Eq 490, applied in *Re Heathcote, Heathcote v Trench* [1904] 1 Ch 826 (decided under the statutory provisions restricting accumulations: see PARA 1133 post); *Norton v Johnstone* (1885) 30 ChD 649; *Re Green, Baldock v Green* (1888) 40 ChD 610 (where no such right was implied); *Re Earl of Stamford and Warrington, Payne v Grey* [1925] Ch 162 (provision for recoupment considered bad, as involving accumulation beyond the period allowed); and see PARA 1133 post. In *Biggar v Eastwood* (1886) 19 LR Ir 49, Ir CA, *Re Heathcote, Heathcote v Trench* [1904] 1 Ch 826 and *Re Webster, Thompson v Thompson* (1910) 102 LT 905, the right of recoupment was expressly or impliedly given and was confined to the period proper in each case.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(iii) Certain Charitable Gifts arising in the Future/1055. Gifts over from one charity to another.

(iii) Certain Charitable Gifts arising in the Future

1055. Gifts over from one charity to another.

A gift over, on a possibly too remote event, from one charity to another has been held to be not invalid under the rule against perpetuities if the gift to the first charity is valid under the rule¹.

Future gifts to charities are in other respects normally subject to the rule², as are gifts over to non-charitable objects after gifts to charities³.

1 See *Christ's Hospital v Grainger* (1849) 1 Mac & G 460; *Re Tyler, Tyler v Tyler* [1891] 3 Ch 252 at 257, 258, CA; *Royal College of Surgeons of England v National Provincial Bank* [1952] AC 631, [1952] 1 All ER 984, HL. This principle has been criticised (see Morris and Leach's Rule against Perpetuities (2nd Edn) 192-194; Gray's

Rule against Perpetuities (4th Edn) ss 597-603.8), but seems too well established now to be disturbed. One cogent criticism based upon the decision of *Re Tyler, Tyler v Tyler* supra is that it is a vehicle by which perpetual non-charitable purpose trusts can be created: see Morris and Leach's Rule against Perpetuities (2nd Edn) 194; Maudsley's Modern Law of Perpetuities 181-183. Caution may, however, be necessary in drafting any formula based upon *Re Tyler, Tyler v Tyler* supra, in view of the Australian case of *Royal Society for the Prevention of Cruelty to Animals New South Wales v Benevolent Society of New South Wales* (1960) 102 CLR 629 (Aust HC), where, distinguishing *Re Tyler, Tyler v Tyler* supra, it was held that the 'conditions' (the setting up and running of a bird sanctuary) upon which the gift over took effect formed part of the trusts upon which the charity held the property and, since the 'conditions' were not charitable, the trusts, not being exclusively charitable, failed. Cf *Re Martin, Barclays Bank Ltd v Board of Governors of St Bartholomew's Hospital* [1952] WN 339, where a gift was expressed to be 'upon trust ... to keep in good order and repair the gravestones ...' Harman J held that the 'condition' relating to the obligation to repair gravestones was bad and that the charity took free from it, but (paradoxically) that the gift over would take effect should the gravestones fall into disrepair. This decision is difficult to reconcile with *Royal Society for the Prevention of Cruelty to Animals New South Wales v Benevolent Society of New South Wales* supra, where it was not cited. As a matter of construction it is submitted that the latter decision is to be preferred. It is unclear whether the condition upon which a gift over takes effect can be removed by the court in directing a scheme cy-près: cf *Re Hanbey's Will Trusts, Cutlers Co v President and Governors of Christ's Hospital, London* [1956] Ch 264, [1955] 3 All ER 874. See CHARITIES vol 8 (2010) PARAS 140-144. Cf *Re Bawden's Settlement, Besant v Board of Governors of the London Hospital* [1953] 2 All ER 1235, [1954] 1 WLR 33n (gifts over for purposes of charity or benevolence held to be void); *George Drexler Ofrex Foundation Trustees v IRC* [1966] Ch 675 at 699, 700, [1965] 3 All ER 529 at 538 (gift over void).

2 As to the statutory exceptions in the case of a gift over of the endowment of a historic building or garden see PARA 1056 post.

3 See CHARITIES vol 8 (2010) PARA 142. Gifts to charities under instruments to which the Perpetuities and Accumulations Act 1964 applies (see PARA 1009 note 2 ante) may be saved from being void for remoteness by the application of the 'wait and see' rule: see s 3 (1) and PARA 1009 ante. The provision enabling a fixed period not exceeding 80 years to be specified as the perpetuity period may also be used: see s 1 and PARA 1010 ante. Where a gift is limited to charitable purposes which subsequently fail, a possibility of reverter or resulting trust on failure will be subject to the rule: see s 12 (1) and PARA 1040 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(iii) Certain Charitable Gifts arising in the Future/1056. Gifts over to charities of endowments of historic buildings etc.

1056. Gifts over to charities of endowments of historic buildings etc.

If a gift for the endowment of a building of outstanding historic or architectural interest has been accepted by the Secretary of State¹, and the trust instrument contains a provision by which, on the failure or determination of the endowment trust, the trust fund purports to be given, or is directed to be held, on charitable trusts, the validity of the gift or direction is deemed not to be, or ever to have been, affected by any rule of law or equity relating to perpetuities². Similar provisions apply in relation to gifts to the Historic Buildings and Monuments Commission for England for the endowment of buildings of outstanding historic or architectural interest or of gardens or other land of outstanding historic interest³.

1 As to the Secretary of State's power to accept such endowments see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1067.

2 See the Historic Buildings and Ancient Monuments Act 1953 s 8 (5) and TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1067. As to the validity of gifts for the endowment of historic buildings see PARA 1006 ante.

3 See *ibid* ss 8A (5), 8B (5) (as added) and TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARAS 1068-1069 respectively.

UPDATE

1056 Gifts over to charities of endowments of historic buildings etc

TEXT AND NOTE 2--Functions under the 1953 Act now exercisable in relation to Wales by the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, Sch 1. As to the National Assembly for Wales see generally CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 42A et seq.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(iv) Contracts as Binding the Person/1057. Exemption of purely contractual rights and obligations.

(iv) Contracts as Binding the Person

1057. Exemption of purely contractual rights and obligations.

In so far as they are merely personal, contracts and contractual rights and obligations as such are altogether outside the rule against perpetuities¹. A contract to pay a sum of money, with interest in the meantime, although unlimited in point of time, is not on that account invalid².

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies³, where a disposition⁴ is or becomes void for remoteness⁵, no remedy in contract or otherwise will, however, lie in respect of it⁶.

1 *Walsh v Secretary of State for India* (1863) 10 HL Cas 367; *Witham v Vane* (1883) Challis's Law of Real Property (3rd Edn) 440, HL; *Borland's Trustee v Steel Bros & Co Ltd* [1901] 1 Ch 279; *Worthing Corp v Heather* [1906] 2 Ch 532; *South Eastern Ry Co v Associated Portland Cement Manufacturers (1900) Ltd* [1910] 1 Ch 12, CA. Cf *Crane v Wallasey Corp* (1912) 107 LT 150, DC. See also PARA 1036 ante.

In *Re Morphew, Worthington v Church Comrs* (1957) 107 L Jo 299, a direction to trustees to postpone in their discretion the calling in of a debt was held to be an administrative provision to which the rule had no application. See also the Perpetuities and Accumulations Act 1964 s 8, exempting the administrative powers of trustees and other persons from the rule, and PARA 1034 ante.

2 *Walsh v Secretary of State for India* (1863) 10 HL Cas 367; *Witham v Vane* (1883) Challis's Law of Real Property (3rd Edn) 440, HL; *London and South Western Ry Co v Gomm* (1882) 20 ChD 562 at 576, 580, CA. As to a covenant to pay a sum of money on an indefinite failure of issue see *Pinbury v Elkin* (1719) 1 P Wms 563 at 566 per Lord Parker LC; *Pleydell v Pleydell* (1721) 1 P Wms 748 at 750. As to covenants, such as options to purchase contained in leases, which create both personal rights in contract and interests in land, see PARA 1037 ante; as to options to renew leases see PARA 1039 ante; and as to covenants running with the land at law, and as to restrictive covenants binding the land, see PARA 1006 ante.

3 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

4 For the meaning of 'disposition' see PARA 1009 note 1 ante.

5 The duration of the perpetuity period will vary according to the type of disposition. Thus, in respect of the conferring of an option to acquire for valuable consideration any interest in land the period is 21 years: see the Perpetuities and Accumulations Act 1964 s 9 (2) and PARA 1037 ante.

6 See *ibid* s 10, which effectively reverses cases such as *Worthing Corp v Heather* [1906] 2 Ch 532 and *Hutton v Watling* [1948] Ch 26, [1947] 2 All ER 641; *affd* [1948] Ch 398, [1948] 1 All ER 803, CA (see further PARA 1036 ante).

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(iv) Contracts as Binding the Person/1058. Company articles.

1058. Company articles.

A company's articles of association under the Companies Act 1985¹ take effect, as regards provisions affecting the relationship of members in their capacity as members², by way of contract³. Accordingly provisions in articles restricting transfers of shares and enabling the directors to call for a transfer from a shareholder⁴, or subjecting the shares of any shareholder to a lien for debts to the company to arise at any time while he is registered as shareholder⁵, are valid.

1 As to debentures see PARA 1118 post.

2 *Beattie v E and F Beattie Ltd* [1938] Ch 708 at 721, [1938] 3 All ER 214 at 218, CA.

3 See the Companies Act 1985 s 14 (1) (repealed). The rule against perpetuities is not concerned with contracts as such: see PARAS 1036, 1057 ante. For a possible application of the Perpetuities and Accumulations Act 1964 s 10 to the contractual relationship between members of an unincorporated association see [1980] MLR 626 at 629.

4 *Borland's Trustee v Steel Bros & Co Ltd* [1901] 1 Ch 279; cf *A-G v Jameson* [1904] 2 IR 644 at 669, 679, 691 (on appeal [1905] 2 IR 218 at 225, 235, Ir CA).

5 See *New London and Brazilian Bank v Brocklebank* (1882) 21 ChD 302, CA; *Bradford Banking Co Ltd v Henry Briggs, Son & Co Ltd* (1886) 12 App Cas 29, HL. Cf *Rearden v Provincial Bank of Ireland* [1896] 1 IR 532.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(v) Interests given by Law; Rights of Entry/1059. Interests given by law.

(v) Interests given by Law; Rights of Entry

1059. Interests given by law.

Interests given by operation of law¹, for example resulting uses and trusts arising under instruments taking effect before 16 July 1964², and rights of escheat in the case of persons who died before 1 January 1926³, are not subject to the rule against perpetuities; and it seems that such rights of reverter as may arise under limitations of determinable fees or by the express or implied operation of a statute are not subject to the rule⁴.

The provisions of the Perpetuities and Accumulations Act 1964 covering determinable interests and the possibilities of reverter and resulting trusts have already been considered⁵.

1 *Re Blunt's Trusts, Wigan v Clinch* [1904] 2 Ch 767, considered and distinguished in *Re Talbot, Jubb v Sheard* [1933] Ch 895. As to statutory interests see PARA 1006 note 21 ante.

2 I.e. the commencement date of the Perpetuities and Accumulations Act 1964. As to instruments to which that Act applies see PARA 1009 note 2 ante. Thus, where a testator makes a charitable trust determinable in favour of the person to whom the property would by law result upon failure of the trust, the rule is not infringed: *Re Randell, Randell v Dixon* (1888) 38 ChD 213; *Re Blunt's Trusts, Wigan v Clinch* [1904] 2 Ch 767; *Re Talbot, Jubb v Sheard* [1933] Ch 895.

3 Escheat, in the case of persons dying after 31 December 1925, was abolished by the Administration of Estates Act 1925 s 45 (1) (d): see REAL PROPERTY vol 39(2) (Reissue) PARA 254. By s 46 (1) (vi) (as reprinted in the Intestates' Estates Act 1952 Sch 1: see s 4), the Crown takes as bona vacantia, in lieu of escheat: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 613. As to the law prior to 1 January 1926 see Gray's Rule against Perpetuities (4th Edn) ss 204, 205.1; and see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 652-657.

4 See *A-G v Cummins* [1906] 1 IR 406 (reverter on a determinable fee created by a Crown grant); Gray's Rule against Perpetuities (4th Edn) s 312. Cf Hoopes' Rules against Perpetuities 116, 5th Supplement (10 October 1968) 7, 8 (as to the publication and printing of this work see PARA 1003 note 5 ante); and see *Re Chardon, Johnston v Davies* [1928] Ch 464 at 468. For a decision to the contrary by the Chancery Court of Lancaster see *Hopper v Liverpool Corp'n* (1943) 88 Sol Jo 213; and see *Imperial Tobacco Co (of Great Britain and Ireland) Ltd v Wilmott* [1964] 2 All ER 510, [1964] 1 WLR 902 (provision for reverter held void). See also REAL PROPERTY vol 39(2) (Reissue) PARA 115. The recommendation in the Fourth Report of the Law Reform Committee (1956) (Cmd 18) PARAS 39, 40, that possibilities of reverter in land should be declared subject to the rule has been implemented by the Perpetuities and Accumulations Act 1964 s 12 (see PARA 1040 ante). As to the vesting in the Crown of the property of a dissolved corporation see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1304; and as to the devolution of property vested in a corporation sole see CORPORATIONS vol 9(2) (2006 Reissue) PARAS 1248 note 5, 1271; EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 353, 361, 366. For examples of statutory rights of reverter on failure of a disposition see the School Sites Act 1841 s 2 and EDUCATION vol 15(2) (2006 Reissue) PARA 1354; the Literary and Scientific Institutions Act 1854 s 4 and NATIONAL CULTURAL HERITAGE vol 7 (2010) PARA 954. Such rights of reverter were preserved by the Law of Property Act 1925 s 7 (1) (amended by the Law of Property (Amendment) Act 1926 s 7, Schedule; the Reverter of Sites Act 1987 s 8 (2), (3), Schedule); but see now the Reverter of Sites Act 1987 and REAL PROPERTY.

5 See the Perpetuities and Accumulations Act 1964 s 12 and PARA 1040 ante.

UPDATE

1059 Interests given by law

NOTE 4--School Sites Act 1841 s 2 amended from a day to be appointed: Commons Act 2006 s 48(2)(b), Sch 6 Pt 3.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(v) Interests given by Law; Rights of Entry/1060. Certain rights of entry.

1060. Certain rights of entry.

Certain rights of entry for the recovery of rentcharges¹ or of re-entry in leases², necessarily incidental to and co-extensive with legal estates and interests, which themselves are unaffected by or not obnoxious to the rule against perpetuities, are exempt from the rule against perpetuities³.

1 See PARA 1006 ante.

2 *Re Tyrrell's Estate* [1907] 1 IR 292 at 298, Ir CA per Walker LC. Cf para 1006 ante. See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 603 et seq.

3 Cf the Third Report of the Commissioners on the Law of Real Property (1832) 37.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(3) INTERESTS TO WHICH THE RULE DOES NOT APPLY/(vi) Interests the Nature of which is a Guarantee against Perpetuity/1061. Interests ending within the period.

(vi) Interests the Nature of which is a Guarantee against Perpetuity

1061. Interests ending within the period.

Where the property limited is a term for an existing life or for existing lives or for not more than 21 years, or any other interest of definite duration which must necessarily end within the perpetuity period, no limitation of that property can be void¹. In creating limitations out of an estate in fee simple, therefore, a term of years to cease within the proper limit may be created, and interests in that term may be limited which could not be limited in the fee simple itself².

¹ *Wastneys v Chappell* (1714) 3 Bro Parl Cas 50, HL; *Low v Burron* (1734) 3 P Wms 262 at 264 (lease for three lives); *Cadell v Palmer* (1833) 1 Cl & Fin 372, HL. As to *Love v Wyndham* (1669) 1 Lev 290 see Lewis's Law of Perpetuity 675, 676. In *King v Cotton* (1732) 2 P Wms 674 no opinion was given by the court. In *Mogg v Mogg* (1815) 1 Mer 654 the cy-près rule was applied to limitations of renewable leaseholds held for lives. See also Lewis's Law of Perpetuity 673; Fearn's Contingent Remainders (10th Edn) 500, Butler's notes; *English v Cliff* [1914] 2 Ch 376 (trust for sale limited to take effect immediately on the expiration of a term of 21 years held to be valid).

² Lewis's Law of Perpetuity 678 et seq; *Cadell v Palmer* (1833) 1 Cl & Fin 372, HL. See also the Third Report of the Commissioners on the Law of Real Property (1832) 38, suggesting a legislative amendment. The conversion of leases for lives into terms of years absolute effected by the Law of Property Act 1925 s 149 (6) does not affect terms taking effect in equity under a settlement: see s 149 (6) proviso (a) and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 240.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(i) Date from which the Period is Reckoned/1062. Date from which the period runs.

(4) APPLICATION OF THE RULE IN GENERAL

(i) Date from which the Period is Reckoned

1062. Date from which the period runs.

The date from which the perpetuity period is reckoned is the date from which the limitation operates, as made by a person limiting as owner or having a power of disposition equivalent to that of ownership¹.

Thus, for a limitation in a will, the period runs from the testator's death and in a deed or non-testamentary instrument from the date of the instrument², provided that in each case the testator or the grantor or settlor has a full power of disposition by that kind of instrument, whether as owner or under a general power of appointment³.

¹ *Rous v Jackson* (1885) 29 ChD 521, not following *Re Powell's Trusts* (1869) 39 LJ Ch 188. Cf *Re Flower, Edmonds v Edmonds* (1885) 55 LJ Ch 200. In *Cooke v Cooke* (1887) 38 ChD 202 an ante-nuptial settlement by a minor contained a covenant for the settlement of her real estate. It was held that the period should be calculated from the date of this instrument and not from the date of the actual conveyance to the uses of the settlement executed by her on attaining 21. See also Morris and Leach's Rule against Perpetuities (2nd Edn) 56-60.

² *Long v Blackall* (1797) 7 Term Rep 100; *Thellusson v Woodford* (1805) 11 Ves 112 at 138, HL; Lewis's Law of Perpetuity 171; Gray's Rule against Perpetuities (4th Edn) s 231. As to the delivery of deeds see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 31, 37-39.

3 As to the time from which the period runs in the case of a general power see PARA 1009 post. For the purposes of the rule against perpetuities, a general power of appointment is where a sole donee can appoint to any person including himself without the consent of anyone else; it is thus equivalent to an absolute vested interest in the subject matter to which the power extends. A power is special, however, where its exercise is circumscribed by restrictions which render it equivalent to something less than absolute ownership: see *Re Earl of Coventry's Indentures, Smith v Earl of Coventry* [1974] Ch 77 at 89-92, [1973] 3 All ER 1 at 12, 13 per Walton J; and see *Muir v Muir* [1943] AC 468 at 478, 479, HL (a Scottish case). It does not depend upon whether the donee can exercise the power by deed or will, or by will only or by deed only: *Stuart v Babington* (1891) 27 LR Ir 551 at 556 per Chatterton V-C; and see POWERS vol 36(2) (Reissue) PARA 206. For the purposes of the perpetuity rule, every power of appointment must be treated as a special power, other than a power under which there is a sole donee, who is at all times free without the concurrence of any other person to appoint to himself, except that a general power to appoint by will only is still to be regarded as a general power: see the Perpetuities and Accumulations Act 1964 s 7 and PARAS 1091, 1096 post. Where a settlor reserves a power of revocation, it seems that the period runs from the date on which that power terminates: see Maudsley's Modern Law of Perpetuities 193, citing the American case of *Cook v Horn* 214 Ga App 289, 104 SE 461 (US 1958).

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(i) Date from which the Period is Reckoned/1063. Exercise of special powers.

1063. Exercise of special powers.

For a limitation in exercise of a special power of appointment the period runs from the creation of the power, not from the date of its exercise, the date of creation being the time from which the appointment operates when regarded as a disposition by way of delegation from the creator of the power¹.

1 See PARA 1100 post.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(i) Date from which the Period is Reckoned/1064. Powers of advancement.

1064. Powers of advancement.

For the purposes of the rule against perpetuities, a power of advancement is analogous to a special power of appointment¹. If the statutory power of advancement² is exercised by trustees of a trust instrument in favour of a minor by way of settlement, the new trusts must be read back into the original trust instrument³. The rule by which, in the case of a special power of appointment, the perpetuity period is calculated from the date of the creation of the power⁴ applies; and, if the new trusts would have infringed the rule against perpetuities if contained in the original trust instrument, they will fail⁵.

1 See *Re Pilkington's Will Trusts, Pilkington v Pilkington* [1961] Ch 466, [1961] 2 All ER 330, CA per Upjohn LJ (on appeal [1964] AC 612, [1962] 3 All ER 622, HL per Viscount Radcliffe). See also *Re Abrahams' Will Trusts, Caplan v Abrahams* [1969] 1 Ch 463, [1967] 2 All ER 1175; *Re Hastings-Bass, Hastings-Bass v IRC* [1975] Ch 25, [1974] 2 All ER 193, CA.

2 See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 76-79.

3 See the cases cited in note 1 supra.

4 See supra and PARA 1100 post.

5 le they will fail at common law. As to instruments taking effect on or after 16 July 1964 (the commencement date of the Perpetuities and Accumulations Act 1964) see s 3 (3) PARA 1009 ante, 1091 post. In *Re Hastings-Bass, Hastings-Bass v IRC* [1975] Ch 25 at 41, [1974] 2 All ER 193 at 203, CA, it was held that, where trustees advanced funds by way of sub-settlement under the Trustee Act 1925 s 32 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 76-78), and that advancement infringed the rule against perpetuities, such parts as did not infringe the rule might take effect provided the operation of the rule was not such as so to alter the intended consequences of the advance that the trustees could not reasonably be supposed to have addressed their minds to the questions relevant to the true effect of the transaction.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2.
THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(ii)
Circumstances taken into Account/1065. Time for ascertaining the facts.

(ii) Circumstances taken into Account

1065. Time for ascertaining the facts.

The time for ascertaining the facts in applying the rule against perpetuities is, in the case of a limitation by will, the date of the testator's death and, in the case of limitation in a non-testamentary instrument, the date of the instrument¹. Similarly, in regard to an appointment under a power, the time for ascertaining the facts is, in the case of a power exercised by will, the date of the testator's death and, in the case of a power exercised by any other instrument, the date of that instrument². After that date, as a general rule³, regard must be had, not to the events which have actually happened, but to the events which might have happened. If the limitations are such that in a possible event the rules as to remoteness would have been infringed, then the limitations fail, even though in the events which actually happened the legal period was not exceeded⁴.

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies⁵, the 'wait and see' provisions of that Act⁶ may apply, the validity of dispositions depending upon events which actually happen within the perpetuity period and not upon the possibility of their occurrence outside that period.

1 *Vanderplank v King* (1843) 3 Hare 1 at 17 per Wigram V-C; *Faulkener v Daniel* (1843) 3 Hare 199 at 216; *Ferrand v Wilson* (1845) 4 Hare 344 at 377; *Lord Dungannon v Smith* (1845) 12 Cl & Fin 546, HL; *Williams v Teale* (1847) 6 Hare 239 at 251 per Wigram V-C; *Re Mervin, Mervin v Crossman* [1891] 3 Ch 197 at 204; *Re Drummond's Settlement, Foster v Foster* [1988] 1 All ER 449, [1988] 1 WLR 234, CA; Lewis's Law of Perpetuity, Supplement 27, 64. Where, however, property is devised upon trust, after the death of a tenant for life, to assure it to the same interests as may then be subsisting concerning another estate, the rule is not infringed by uncertainty at the testator's death whether the limitations introduced by reference will exceed the rule: *Re Fane, Fane v Fane* [1913] 1 Ch 404, CA per Buckley LJ, distinguishing *Lord Dungannon v Smith* supra.

2 If a separate sum is appointed to each member of a class independently of the others, the appointment may be good as to some and bad as to others: see *Peard v Kekewich* (1852) 15 Beav 166 (a case of a devise to A for life, remainder to A's children as he should appoint; A by his will directed the rents to be accumulated until his son B or other sons should attain 23, the direction was not remote as to B, who was unborn at the date of the will but three years of age at the date of death of the original testator); *Morgan v Gronow* (1873) LR 16 Eq 1; *Wilkinson v Duncan* (1861) 30 Beav 111. Cf *Von Brockdorff v Malcolm* (1885) 30 ChD 172; *Re Hallinan's Trusts* [1904] 1 IR 452, Ir CA (appointment by will, under special power conferred by settlement, to a daughter on attaining 25; appointee was 15 at the date of the testator's death; appointment held not void for remoteness); *Re Thompson, Thompson v Thompson* [1906] 2 Ch 199; *Re Clarke's Settlement Trust, Wanklyn v Streatfeild* [1916] 1 Ch 467 (the nature and quality of the property must be regarded as at the time when the appointment becomes operative); *Re Paul, Public Trustee v Pearce* [1921] 2 Ch 1 (appointment by will to A valid, although vesting was postponed until he was 25; A was 18 at the appointor's death); and see *White v Stamps Comr* (1908) 8 SRNSW 287. The decision in *Re Wright, Whitworth v Wright* [1906] 2 Ch 288 is said to depend on circumstances not reported: see (1907) 23 LQR 9; and Jarman on Wills (8th Edn) 328 note (f). As to the statutory validation of certain gifts when vesting is postponed see PARA 1070 post.

3 As to taking subsequent events into consideration in case of a limitation with double aspect see PARA 1083 post.

4 *Jee v Audley* (1787) 1 Cox Eq Cas 324 at 326 (to daughters of A living at a remote period); *Proctor v Bishop of Bath and Wells* (1794) 2 Hy Bl 358 (gift over on A having no son bred a clergyman, when A had no son at all); *Hodson v Ball* (1845) 14 Sim 558 (gift over of child's share on failure of issue during life of child's husband or wife); *Lord Dungannon v Smith* (1845) 12 Cl & Fin 546 at 563, HL per Cresswell J; *Harding v Nott* (1857) 7 E & B 650 at 657, 658; *Re Lowman, Devenish v Pester* [1895] 2 Ch 348 at 365, 367, CA; *Re Wilmer's Trusts, Moore v Wingfield* [1903] 1 Ch 874 at 879 per Buckley J (approved on appeal [1903] 2 Ch 411 at 420, 422, CA); *Re Beales' Settlement, Barrett v Beales* [1905] 1 Ch 256.

5 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

6 See *ibid* s 3 (1)-(3) and PARA 1009 ante, implementing the recommendation of the Fourth Report of the Law Reform Committee (1956) (Cmnd 18) PARAS 17-23.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(ii)

Circumstances taken into Account/1066. Admissibility of evidence; presumptions and evidence as to future parenthood.

1066. Admissibility of evidence; presumptions and evidence as to future parenthood.

At common law, in considering the validity of any limitation, the court could look at evidence of facts existing when the instrument came into operation¹, but not at evidence of what actually took place after that time, or at evidence of opinion of probability of even the highest degree². Accordingly, no evidence could be given that a woman was past child-bearing; nor would the court draw such an inference, however advanced her age³.

However, in relation to instruments to which the Perpetuities and Accumulations Act 1964 applies⁴, where in any proceedings⁵ there arises on the rule against perpetuities⁶ a question which turns on the ability of a person to have a child⁷ at some future time, then:

35 (1) subject to head (2) below, it is to be presumed⁸ that a male can have a child at the age of 14 years or over, but not under that age, and that a female can have a child at the age of 12 years or over, but not under that age or over the age of 55 years⁹; but

36 (2) in the case of a living person evidence may be given to show that he or she will or will not be able to have a child¹⁰ at the time in question¹¹.

Where any such question is decided by treating a person as unable to have a child at a particular time¹², and he or she does so, the High Court may make such order as it thinks fit for placing the persons interested in the property comprised in the disposition, so far as may be just, in the position they would have held if the question had not been so decided¹³.

1 *Vanderplank v King* (1843) 3 Hare 1 at 13 per Wigram V-C; *Southern v Wollaston* (1852) 16 Beav 276 (gift to A for life, remainder to A's children who should attain 25 as tenants in common; remainder void for remoteness if A survived the testator, but good if A predeceased testator, because it must in that case vest, if at all, within lives in being); *Re Wood, Tullett v Colville* [1894] 3 Ch 381 at 387, CA per Davey LJ; *Re Thompson, Thompson v Thompson* [1906] 2 Ch 199. As to the validation by statute of gifts where vesting is postponed beyond the age of 21 see PARA 1070 post. See also *Re Dawson, Johnston v Hill* (1888) 39 ChD 155 at 159 per Chitty J; *Re Russell, Dorrell v Dorrell* [1895] 2 Ch 698, CA; *Re Morrison's Will Trusts, Walsingham v Blathwayt* [1940] Ch 102, [1939] 4 All ER 332. Evidence will be allowed of the fact that a person was en ventre sa mère at the testator's death (*Theellusson v Woodford* (1805) 11 Ves 112, HL; *Blackburn v Stables* (1814) 2 Ves & B 367; *Storrs v Benbow* (1853) 3 De GM & G 390); or of the fact that the whole of a class of issue were then

ascertained (*Southern v Wollaston* supra; *Re Thompson, Thompson v Thompson* supra); or that a line of issue had then failed (*Faulkener v Daniel* (1843) 3 Hare 199). See also *Ward v Van der Loeff, Burnyeat v Van der Loeff* [1924] AC 653, HL.

2 *Jee v Audley* (1787) 1 Cox Eq Cas 324 (where Kenyon MR refused to assume that it was impossible for persons aged 70 to have children); *Re Dawson, Johnston v Hill* (1888) 39 ChD 155 (followed in *IRC v Bernstein* [1960] Ch 444 at 455, [1960] 1 All ER 697 at 702; on appeal [1961] Ch 399, [1961] 1 All ER 320, CA); *Re Wood, Tullet v Colville* [1894] 3 Ch 381 at 387, CA (trust to work out gravel pits and then sell); *Re Bewick, Ryle v Ryle* [1911] 1 Ch 116; *Ward v Van der Loeff, Burnyeat v Van der Loeff* [1924] AC 653 at 679, 680, HL per Lord Blanesburgh; and see *Re Petrie, Lloyds Bank Ltd v Royal National Institute for the Blind* [1962] Ch 355 at 363, 364, [1961] 3 All ER 1067 at 1069, 1070, CA. The 'wait and see' rule now applies in relation to instruments to which the Perpetuities and Accumulations Act 1964 applies: see s 3 (1) and PARA 1009 ante.

3 *Jee v Audley* (1787) Cox Eq Cas 324 (cited in note 2 supra); *Re Sayer's Trusts* (1868) LR 6 Eq 319 (woman aged 62 at testator's death); *Re Dawson, Johnston v Hill* (1888) 39 ChD 155 (woman over 60 at testator's death), where *Cooper v Laroche* (1881) 17 ChD 368, to the contrary effect, was explained; and see *Rackstraw v Douglas* 1917 SC 284 (spinster aged 81); *Ward v Van der Loeff, Burnyeat v Van der Loeff* [1924] AC 653, HL (spouses aged 66); *IRC v Bernstein* [1960] Ch 444 at 454, 455, [1960] 1 All ER 697 at 702 (on appeal [1961] Ch 399, [1961] 1 All ER 320, CA). See also CIVIL PROCEDURE vol 11 (2009) PARA 1102. As to the inability of the court to presume that a woman is past child-bearing for the purposes of validating provisions for accumulation see PARA 1120 post. See, however, *Re Pettifor's Will Trusts, Roberts v Roberts* [1966] Ch 257 at 260, [1966] 1 All ER 913 at 915 (as a matter of administration the court will allow distribution on the footing that a woman aged 78 had become incapable of child-bearing). It was recommended that there should be a rebuttable presumption that no woman who has attained 55 is capable of bearing a child: see the Fourth Report of the Law Reform Committee (1956) (Cmd 18) PARAS 11-13, which was implemented by the Perpetuities and Accumulations Act 1964 s 2 (see infra). As to the ability of a person to have a child after his death see PARA 1026 ante.

4 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

5 The presumption only arises in proceedings: *ibid* s 2 (1). It has been suggested that cases could nevertheless be settled out of court if it is clear that the presumption applies and no rebutting evidence is available: see Morris and Leach's Rule against Perpetuities (2nd Edn), 1964 Supplement 4. Caution is, however, necessary because, if evidence later becomes available, the court will not be able to invoke the power to make such order as it thinks fit for placing the persons interested in the property in the position they would have held if the question had not been so decided, as the question will not have been 'decided': see the Perpetuities and Accumulations Act 1964 s 2 (2) and the text to notes 12, 13 infra.

6 *Ibid* s 2 also applies to any questions as to the beneficiaries' right to put an end to accumulations of income under any disposition as it applies to questions arising on the rule against perpetuities (*ibid* s 14), but not for other purposes eg the class-closing rules. For the meaning of 'disposition' see PARA 1009 note 1 ante.

7 For these purposes, references to having a child are references to begetting or giving birth to a child, but the provisions of *ibid* s 2 (except s 2 (1) (b): see head (2) infra) apply in relation to the possibility that a person will at any time have a child by adoption, legitimation or other means, as they apply to his or her ability at that time to beget or give birth to a child: s 2 (4). 'Begetting' probably includes births induced by artificial insemination or in vitro fertilisation; but see PARA 1026 ante.

8 The presumption is rebuttable: see *ibid* s 2 (1) (b), (2) As to the application of s 2 see note 6 supra.

9 *Ibid* s 2 (1) (a).

10 For these purposes, the term means begetting or giving birth to a child only: see *ibid* s 2 (4) and note 7 supra.

11 *Ibid* s 2 (1) (b).

12 Where any such question is decided in relation to a disposition by treating a person as able or unable to have a child at a particular time, then, subject to *ibid* s 2 (2), he or she is to be so treated for the purpose of any question which may arise on the rule against perpetuities in relation to the same disposition in any subsequent proceedings: s 2 (3). See also note 5 supra.

13 *Ibid* s 2 (2). Unless the application for an order under s 2 (2) is made in pending proceedings, the proceedings must be begun by originating summons: see RSC Ord 5 r 3 and CIVIL PROCEDURE.

UPDATE

1066 Admissibility of evidence; presumptions and evidence as to future parenthood

TEXT AND NOTE 13--RSC replaced by the Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(iii) Duration of Limitations and Postponement of Enjoyment/1067. Duration of limitations.

(iii) Duration of Limitations and Postponement of Enjoyment

1067. Duration of limitations.

The rule against perpetuities does not affect remoteness in the cesser of limitations¹; it is the vesting of the interest that is considered, not its duration. Accordingly, an interest may be given to an unborn person for life², or until marriage³, or until any other event⁴, provided it must vest, if at all, within the proper period; or to a succession of unborn persons whose interests will vest within the proper period⁵; or to a number of persons for life who may be unborn at the testator's death⁶. In each of these cases the limitation is valid without reference to the validity of the subsequent limitation⁷. No limitation can, however, be made directly to the survivor of a number of unborn persons⁸.

Under the 'wait and see' rule of the Perpetuities and Accumulations Act 1964⁹, dispositions¹⁰ under instruments to which that Act applies¹¹ will not be void merely because it is possible for the interest to vest outside the period; until it is established that it must so vest, if vest at all, the limitation is treated as valid for perpetuity purposes.

1 Lewis's Law of Perpetuity 173, cited with approval in *Wainwright v Miller* [1897] 2 Ch 255 at 261. See also *Charitable Donations and Bequests Comrs v Baroness De Clifford* (1841) 1 Dr & War 245 (a devise of a qualified fee with gift over; gift over held to be void for remoteness); *Re Randell, Randell v Dixon* (1888) 38 ChD 213 (charitable trust to pay income for particular purpose, without limit as to time; when purpose at an end, the trust ceased and property fell into residue); *Re Blunt's Trusts, Wigan v Clinch* [1904] 2 Ch 767; *Re Chardon, Johnston v Davies* [1928] Ch 464 (£200 bequeathed to trustees to pay income to cemetery company during period the company kept certain graves in order, with gift over to residuary legatees; all interests in the £200, legal and equitable, vested and therefore no infringement of the rule against perpetuities; nor did trust offend the rule against inalienability); *Re Chambers' Will Trusts, Official Trustees of Charitable Funds v British Union for the Abolition of Vivisection* [1950] Ch 267; *Douglas v Brownlee* (1884) 3 NZLR 57 at 63 (NZ CA) (easement, where the cesser was introduced by a proviso, subsequent to the grant).

2 Examples of, or references to, gifts of life interests to unborn persons are to be found in many cases eg *Cotton v Heath* (1638) 1 Eq Cas Abr 191, pl 2; *Duke of Marlborough v Earl Godolphin* (1759) 1 Eden 404 at 415; *Hay v Earl of Coventry* (1789) 3 Term Rep 83 at 86; *Routledge v Dorril* (1794) 2 Ves 357 at 366; *Williams v Teale* (1847) 6 Hare 239 at 250; *Cattlin v Brown* (1853) 11 Hare 372; *Gooch v Gooch* (1853) 3 De GM & G 366; *Stuart v Cockerell* (1870) 5 Ch App 713; *Hampton v Holman* (1877) 5 ChD 183; *Re Ashforth, Sibley v Ashforth* [1905] 1 Ch 535 at 540. A life estate may, therefore, be given to the husband or wife of a living unmarried person, even though that husband or wife is possibly unborn at the date of the gift. Cf *Congreve v Harrison* (1847), cited in 1 John & H at 662; *Re Merricks' Trusts* (1866) LR 1 Eq 551; *Re Harvey, Peek v Savory* (1888) 39 ChD 289, CA.

3 *Re Gage, Hill v Gage* [1898] 1 Ch 498 (appointment in exercise of special power, contained in appointee's marriage settlement, to daughters until marriage, with gifts over to a class to be then ascertained; the appointment to daughters held good, because it commenced within the proper period, although it might extend beyond it; gift over held void for remoteness being in favour of a class who might not be ascertained until after the proper period); *Re Crichton's Settlement, Sweetman v Batty* (1912) 106 LT 588.

4 *Wainwright v Miller* [1897] 2 Ch 255, referred to in *Re Chardon, Johnston v Davies* [1928] Ch 464 at 468; *Re Chambers' Will Trusts, Official Trustees of Charitable Funds v British Union for the Abolition of Vivisection* [1950] Ch 267. Cf *Re Wightwick's Will Trusts, Official Trustees of Charitable Funds v Fielding-Ould* [1950] Ch 260, [1950] 1 All ER 689; and see *Boughton v James* (1844) 1 Coll 26 at 46 (on appeal (1848) 1 HL Cas 406); *Gooding v Read* (1853) 4 De GM & G 510. See also Lewis's Law of Perpetuity 173, cited in *Wainwright v Miller* supra at 26 per Byrne J.

5 *Cadell v Palmer* (1833) 1 Cl & Fin 372, HL; *Garland v Brown* (1864) 10 LT 292; *Re Hargreaves, Midgley v Tatley* (1889) 43 ChD 401 at 405, CA per Cotton LJ (devises in trust of a series of life estates to sisters and sisters' children held good; but power of appointment given to the last survivor of the sisters and their children held void for remoteness). The rule prohibiting limitations to successive generations of unborn issue, under which such a limitation might be invalidated apart from the rule against perpetuities, has been abolished by the Law of Property Act 1925 s 161 as respects limitations of trusts coming into operation after 31 December 1925: see PARA 1003 ante.

6 *Williams v Teale* (1847) 6 Hare 239 at 250; *Gooch v Gooch* (1853) 3 De GM & G 366 (gift to children for their lives assumed to include unborn children). See also *Re Seely, Langton v Langton* (1920) 149 LT Jo 462.

7 *Hampton v Holman* (1877) 5 ChD 183 at 188 per Jessel MR (disapproving *Hayes v Hayes* (1828) 4 Russ 311); and see *Williams v Teale* (1847) 6 Hare 239 at 250; *Re Roberts, Repington v Roberts-Gawen* (1881) 19 ChD 520 at 530, CA. The statements in *Hay v Earl of Coventry* (1789) 3 Term Rep 83 at 86; *Tregonwell v Sydenham* (1815) 3 Dow 194 at 207 per Lord Redesdale, and *Evans v Walker* (1876) 3 ChD 211 at 213, are ambiguous in this respect. As to cases in which the cy-près doctrine was applied in the case of gifts of successive life interests see PARA 1004 ante.

8 *Courtier v Oram* (1855) 21 Beav 91; *Garland v Brown* (1864) 10 LT 292; and see Gray's Rule against Perpetuities (4th Edn) s 277; *Re Hargreaves, Midgley v Tatley* (1890) 43 ChD 401, CA; *Re Ashforth, Sibley v Ashforth* [1905] 1 Ch 535; *Whitby v Von Luedecke* [1906] 1 Ch 783 (followed, with doubts, in *Re Samuda's Settlement Trusts, Horne v Courtenay* [1924] 1 Ch 61, but followed also in *Re Legh's Settlement Trusts, Public Trustee v Legh* [1938] Ch 39, [1937] 3 All ER 823, CA, where those doubts were disapproved); *Re Hey's Settlement Trusts, Hey v Nickell-Lean* [1945] Ch 294, [1945] 1 All ER 618. See also *Re Crichton's Settlement, Sweetman v Batty* (1912) 106 LT 588; *Re Manning's Trusts* (1915) 49 ILT 143 (testatrix appointed under a special power a share of funds to two grandchildren and, in the event of either dying under 21 or unmarried, then the share of the one so dying to the survivor; limitation to the survivor void for remoteness); *Re Ramadge's Settlement, Hamilton v Ramadge* [1919] 1 IR 205. The decision in *Avern v Lloyd* (1868) LR 5 Eq 383, that such a gift is valid on the ground of the power of alienation of each person over the contingent right, was overruled by *Re Hargreaves, Midgley v Tatley* supra. The assumption of Shadwell V-C in *Ashley v Ashley* (1833) 6 Sim 358 that a gift by will of a life interest to A, remainder to A's children (unborn) for life as tenants in common with cross remainders for life, was valid was criticised in *Stuart v Cockerell* (1869) LR 7 Eq 363 at 370 (on appeal (1870) 5 Ch App 713), and in Marsden's Rule against Perpetuities 177; but defended in Gray's Rule against Perpetuities (4th Edn) s 207. See also *Cooke v Bowler* (1836) 2 Keen 54 (considered in Marsden's Rule against Perpetuities 179; Gray's Rule against Perpetuities (4th Edn) s 207.1); *Whitby v Von Luedecke* supra. The dictum of Lord Cranworth LC in *Gooch v Gooch* (1853) 3 De GM & G 366 at 383 that a limitation to a number of unborn persons for their lives 'with benefit of survivorship' is valid must now be deemed incorrect: see *Re Legh's Settlement Trusts, Public Trustee v Legh* supra at 46, 51 and at 826, 829; and see *Re Ashforth, Sibley v Ashforth* supra at 541 per Farwell J.

9 See the Perpetuities and Accumulations Act 1964 s 3 (1) and PARA 1009 ante.

10 For the meaning of 'disposition' see PARA 1009 note 1 ante.

11 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(iii) Duration of Limitations and Postponement of Enjoyment/1068. Postponement of possession.

1068. Postponement of possession.

The rule against perpetuities does not prescribe any limit within which estates and interests must come into possession. The rule does not concern itself with provisions postponing the

enjoyment of estates and interests, if those estates and interests must be vested within the proper limits¹.

A limitation subsequent to an estate for life of an unborn person is not invalid under the rule so long as the vesting is not postponed beyond the perpetuity period². Thus, the contingency on which vesting is to take place must not depend on the death of the unborn tenant for life³.

1 Lewis's Law of Perpetuity 511 et seq; *Montgomerie v Woodley* (1800) 5 Ves 522 (devises of real estate in strict settlement, with a subsequent direction postponing devisees' possession until 25); *Dennis v Frend* (1863) 14 I Ch R 271 (devise giving vested estate at testator's death, with attempted postponement of possession until 23); and see Tudor's Leading Cases on Real Property (4th Edn) 612; Fearn's Contingent Remainders (10th Edn), Butler's Notes 215-217.

2 *Evans v Walker* (1876) 3 ChD 211; *Cattlin v Brown* (1853) 11 Hare 372 at 375; *Re Norton, Norton v Norton* [1911] 2 Ch 27; *Re Seely, Langton v Langton* (1920) 149 LT Jo 462; *Re Coleman, Public Trustee v Coleman* [1936] Ch 528, [1936] 2 All ER 225; and see *Re Hubbard's Will Trusts, Marston v Angier* [1963] Ch 275 at 285, 286, [1962] 2 All ER 917 at 922. As respects instruments coming into operation before 1 January 1926, the subsequent limitation might be void under the rule in *Whitby v Mitchell*: see the cases cited in PARA 1003 note 6 ante.

3 See PARA 1022 note 2 ante; *Re Merricks' Trusts* (1866) LR 1 Eq 551 at 558 (bequest of a fund after the death of the testator's daughter, and any husband she might leave surviving her, to four persons by name who should then be living, or to the lawful issue of such of them as should be then dead; held that it was not necessary for the 'issue', construed as 'children', to survive the possible husband of testator's daughter, but that it was the possession only, and not the vesting, of the remainder to the issue, which was postponed to the death of the possible husband). See also *Re Norton, Norton v Norton* [1911] 2 Ch 27.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(iii) Duration of Limitations and Postponement of Enjoyment/1069. Effect of postponement on validity of gift.

1069. Effect of postponement on validity of gift.

Except in cases where by statute the age of 21 years is substituted for a greater age¹:

- 37 (1) a direction that an unborn devisee or alienee is not to be entitled to possession of his estate until either attaining a certain age greater than 21 or other remote event; or
- 38 (2) a condition making a gift to an individual or class dependent upon the attaining of such an age or upon the happening of such an event,

may constitute a condition precedent to the vesting of the estate, and render the limitation void under the rule against perpetuities².

Such a direction or condition may, however, merely postpone enjoyment, the right to the estate being vested at birth or at some other time independent of the age or event concerned, in which case the limitation is not rendered invalid³. A gift over on the devisee's not attaining the required age is then construed as a limitation divesting the previous vested gift, and only the gift over is void⁴. A provision that the interest of an alienee is not to be vested until, or is to be vested at, such an age is, however, generally too strong to allow a construction rendering the gift valid⁵, unless 'vested' can be construed to mean indefeasibly vested⁶. If interest is given for maintenance in the meantime, the gift may admit of being construed as vested at an earlier date, and not void⁷, even where there is a discretion conferred on trustees to apply less than the whole income⁸, but not where the alienees form a contingent class, or where an aliquot share is not appropriated to each legatee, or where the surplus income is to be accumulated⁹. Where there is no gift except in a direction to pay, and the date of payment is too remote, the

gift itself is too remote¹⁰; but, where there is a valid gift with an independent and distinct direction to pay at a remote period, the latter direction does not affect the vesting or the validity of the gift¹¹. It is a matter of construction in each case.

In relation to dispositions under instruments taking effect on or after 16 July 1964, the mere possibility of vesting being postponed beyond the perpetuity period will not invalidate the gift¹².

1 See the Law of Property Act 1925 s 163 (repealed in relation to instruments taking effect on or after 16 July 1964: see PARA 1009 note 2 ante, 1070 post). As to the reduction of age (not necessarily to 21) in relation to instruments taking effect after the commencement of the Perpetuities and Accumulations Act 1964 see s 4 (1) and PARA 1070 post.

2 *Boughton v Boughton, Boughton v James* (1848) 1 HL Cas 406 at 433, where there was a limitation of real and personal estates upon trust to accumulate the income, with a direction to divide the whole property with accumulations among a class consisting of all sons of the testator's nephews living, until a son first attained 25. It was held that the gift was in the direction and was void for remoteness. See also *Re Wrightson, Battie-Wrightson v Thomas* [1904] 2 Ch 95, CA, explained in *White v Summers* [1908] 2 Ch 256 at 267 per Parker J. Cf *Edmunds v Waugh* (1858) 4 Drew 275 (on appeal on other grounds (1863) 2 New Rep 408), where a clause directing investment 'within three months after my decease' was treated as merely parenthetical and indicating an intention as to the period of investment, and not as imposing a condition precedent. As to the distinction between vested and contingent interests see REAL PROPERTY vol 39(2) (Reissue) PARA 166; and as to the vesting of gifts by will see WILLS vol 50 (2005 Reissue) PARA 696 et seq.

3 If there is a clear immediate gift, vesting is not postponed by subsequent equivocal words purporting to defer possession, or to suspend the beneficial use (*Dodson v Hay* (1791) 3 Bro CC 405; *Montgomerie v Woodley* (1800) 5 Ves 522 (cited in PARA 1068 note 1 ante); *Bingley v Broadhead* (1803) 8 Ves 415), or to defer payment (*Blease v Burgh* (1840) 2 Beav 221; *Saumarez v Saumarez* (1865) 34 Beav 432; and see Lewis's Law of Perpetuity 511, and Supplement 170). The terms of a gift over may show that the previous gift confers a vested interest before the specified age: *Bland v Williams* (1834) 3 My & K 411; and see the text and note 4 infra. The fact that the fund given is to be separated at once or at the death of a tenant for life may be sufficient to cause the interests in the fund to vest at that period: *Greet v Greet* (1842) 5 Beav 123; *Harrison v Grimwood* (1849) 12 Beav 192. The direction for postponement in all cases where interests are previously vested is not effective after the alienee has become entitled to give a receipt, and has no effect on devolution of the property on death before 21; cf para 1052 ante.

4 *Bland v Williams* (1834) 3 My & K 411; *Davies v Fisher* (1842) 5 Beav 201; *Harrison v Grimwood* (1849) 12 Beav 192; *Taylor v Frobisher* (1852) 5 De G & Sm 191; *Hobbs v Parsons* (1854) 2 Sm & G 212; *Re Edmondson's Estate* (1868) LR 5 Eq 389 at 398 per Page Wood V-C; *Re Ludwig, Ludwig v Evans* [1916] 2 Ch 26, CA (direction of weekly payments for testator's daughter-in-law and her children by testator's son, until youngest of her children attained 30, and after the youngest of her children attained that age, capital to be divided among daughter-in-law and her children; children's interests vested and not contingent, and therefore the direction to divide not void for remoteness); and see WILLS vol 50 (2005 Reissue) PARA 722.

5 *Griffith v Blunt* (1841) 4 Beav 248 (shares of sons 'to be vested at' 25, and of daughters at 25 or marriage, and, if one child only, to be paid at 25 or marriage); *Comport v Austen* (1841) 12 Sim 218; *Re Morse's Settlement* (1855) 21 Beav 174 (as to this case, which was a case of a deed, see Jarman on Wills (8th Edn) 1344 note (r)); *Rowland v Tawney* (1858) 26 Beav 67; *Re Wrightson, Battie-Wrightson v Thomas* [1904] 2 Ch 95, CA.

6 Such a construction was adopted in *Berkeley v Swinburne* (1848) 16 Sim 275 at 281, 282 (gift over treating children's shares as original gifts to them, belonging to them from the death of the tenant for life, followed by clauses for their maintenance and advancement); *Taylor v Frobisher* (1852) 5 De G & Sm 191 at 199 per Parker V-C; *Re Baxter's Trusts* (1864) 4 New Rep 131; *Re Edmondson's Estate* (1868) LR 5 Eq 389 (where Page Wood V-C found two things in the will showing an intention not to postpone vesting; if a child's share was construed to be contingent (1) an accruer clause would have become useless and unnecessary; and (2) there would have been an intestacy as regards the share of a child dying under 25 leaving issue).

7 *Jackson v Marjoribanks* (1841) 12 Sim 93; *Davies v Fisher* (1842) 5 Beav 201; *Bell v Cade* (1861) 2 John & H 122; *Tatham v Vernon* (1861) 29 Beav 604; and see *Grogan v Dopping* (1856) 6 I Ch R 265. There are dicta in *Pearson v Dolman* (1866) LR 3 Eq 315 at 321 per Page Wood V-C, and in *Thomas v Wilberforce* (1862) 31 Beav 299 at 302 per Lord Romilly MR, to the effect that, where there is a 'gap' or 'chasm' between the direction as to interest during minority and as to principal at a subsequent age, there is a difficulty in holding that vesting is not postponed to the subsequent age. See also *Doe d Dolley v Ward* (1839) 9 Ad & El 582; *Willson v Copley* [1870] WN 46; *Re Campbell, Cooper v Campbell* (1919) 88 LJ Ch 239.

8 *Fox v Fox* (1875) LR 19 Eq 286, doubted in *Dewar v Brooke* (1880) 14 ChD 529, and dissented from in *Re Wintle, Tucker v Wintle* [1896] 2 Ch 711, but not disapproved in *Re Turney, Turney v Turney* [1899] 2 Ch 739 at

747, CA per Lindley LJ and at 747, 748 per Jeune P. See also *Haworth v IRC* [1974] STC 378 at 386, 387; and see *Hardcastle v Hardcastle* (1862) 1 Hem & M 405 at 410 per Page Wood V-C. The construction which was applied by Jessel MR in *Fox v Fox* supra was aided by a gift over. As to the effect of a gift over in aiding the construction in such a case see dicta of Jessel MR in *Re Parker, Barker v Barker* (1880) 16 ChD 44 at 46; and Neville J in *Re Williams, Williams v Williams* [1907] 1 Ch 180 at 185; and Jarman on Wills (8th Edn) 1399-1403, where it is suggested that *Fox v Fox* supra and *Re Wintle, Tucker v Wintle* supra can be distinguished and reconciled on this ground. *Fox v Fox* supra and *Re Williams, Williams v Williams* supra were followed in *Re Ussher, Foster v Ussher* [1922] 2 Ch 321, which was discussed in *Re Blackwell, Blackwell v Blackwell* [1926] Ch 223 at 232, CA per Pollock MR; and see *Re Levy, Cohen v Cohen* (1907) 7 SRNSW 885.

9 *Re Thatcher's Trusts* (1859) 26 Beav 365; *Re Parker, Barker v Barker* (1880) 16 ChD 44; *Re Ricketts, Ricketts v Ricketts* (1910) 103 LT 278; *Re Hume, Public Trustee v Mabey* [1912] 1 Ch 693; and see *Haworth v IRC* [1974] STC 378 at 387 (the rule as stated in *Re Hume, Public Trustee v Mabey* supra at 699 not applicable to gift to contingent class; but it is not clear whether it applies to inter vivos dispositions: see *Haworth v IRC* supra at 387, where that question was left open).

10 *Leake v Robinson* (1817) 2 Mer 363 at 385 per Grant MR; *Chance v Chance* (1853) 16 Beav 572; *Merlin v Blagrove* (1858) 25 Beav 125.

11 *Farmer v Francis* (1824) 2 Bing 151; *Kevern v Williams* (1832) 5 Sim 171 (not followed on the point of construction in *Re Ransome, Moberly v Ransome* [1957] Ch 348 at 360, [1957] 1 All ER 690 at 695); *Harrison v Grimwood* (1849) 12 Beav 192; *Hodson v Micklethwaite* (1854) 2 Drew 294; and see *Leeming v Sherratt* (1842) 2 Hare 14 at 21.

12 See the Perpetuities and Accumulations Act 1964 s 3 (1) and PARA 1009 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2.
THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(iii) Duration of
Limitations and Postponement of Enjoyment/1070. Validation of gifts where vesting postponed.

1070. Validation of gifts where vesting postponed.

Where in a will, settlement, or other instrument taking effect before 16 July 1964 the absolute vesting either of capital or income of property, or the ascertainment of a beneficiary or class of beneficiaries, is made to depend on the attainment by the beneficiary or members of the class of an age exceeding 21, and thereby the gift to that beneficiary or class, or any member of it, or any gift over, remainder, executory limitation or trust arising on the total or partial failure of the original gift is, or but for this provision would be, rendered void for remoteness, the will, settlement or other instrument takes effect for the purposes of such gift, gift over, remainder, executory limitation or trust, as if that absolute vesting or ascertainment had been made to depend on the beneficiary or member of the class attaining the age of 21, and that age is to be substituted for the age stated in the will, settlement or other instrument¹. This provision applies to any instrument executed after 31 December 1925 and taking effect before 16 July 1964, and to any testamentary appointment (whether made in exercise of a general or special power), devise or bequest contained in the will of a person dying after 31 December 1925, whether the will is made before, on or after that date². It applies without prejudice to any provision by which the absolute vesting or ascertainment is also made to depend on the marriage of any person, or any other event which may occur before the age stated in the will, settlement or other instrument is attained³.

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies⁴, where a disposition⁵ is limited by reference to the attainment by any person or persons⁶ of a specified age exceeding 21⁷, and it is apparent at the time the disposition is made or becomes apparent at a subsequent time⁸:

- 39 (1) that the disposition would otherwise⁹ be void for remoteness¹⁰, but
- 40 (2) that it would not be so void if the specified age had been 21 years¹¹,

the disposition is, however, to be treated for all purposes as if, instead of being limited by reference to the age in fact specified, it had been limited by reference to the age¹² nearest to that age which would, if specified instead, have prevented the disposition from being so void¹³.

Where in the case of any disposition different ages exceeding 21 are specified in relation to different persons¹⁴, the reference in head (2) above to the specified age is to be construed as a reference to all the specified ages¹⁵, and the above provisions¹⁶ operate to reduce each such age so far as is necessary to save the disposition from being void for remoteness¹⁷.

Where the above provisions have effect in relation to a disposition to which the 'wait and see' rule applies¹⁸, the operation of these provisions does not affect the validity of anything previously done in relation to the interest disposed of¹⁹ by way of advancement, application of intermediate income or otherwise²⁰.

1 Law of Property Act 1925 s 163 (1) (repealed in relation to instruments taking effect on or after 16 July 1964: see PARA 1009 note 2 ante and infra).

2 Ibid s 163 (2) (repealed in relation to instruments taking effect on or after 16 July 1964: see PARA 1009 note 2 ante and infra).

3 Ibid s 163 (3) (repealed in relation to instruments taking effect on or after 16 July 1964: see PARA 1009 note 2 ante and infra).

4 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

5 For the meaning of 'disposition' see PARA 1009 note 1 ante.

6 The person need not be a beneficiary: see Megarry and Wade's Law of Real Property (5th Edn) 268.

7 As to the effect of advances in cryobiology on a disposition limited by reference to the attainment of an age below 21 see PARA 1026 ante.

8 Cf the Fourth Report of the Law Reform Committee (1956) (Cmnd 18) PARAS 26, 27, where it was recommended that the 'wait and see' rule (see PARA 1009 ante) should be applied only if reducing the specified age still failed to save the disposition.

9 Ie by applying the common law rule as modified by the Law of Property Act 1925 s 163 (repealed in relation to instruments taking effect on or after 16 July 1964: see PARA 1009 note 2 ante and supra) and then the 'wait and see' provisions (see PARA 1009 ante): see the Perpetuities and Accumulations Act 1964 s 4 (1) (a) ('apart from this section').

10 Ibid s 4 (1) (a).

11 Ibid s 4 (1) (b); but see PARA 1026 ante.

12 This is not necessarily 21 years as in the Law of Property Act 1925 s 163 (repealed in relation to instruments taking effect on or after 16 July 1964: see PARA 1009 note 2 ante and supra). Thus, eg in a testamentary disposition taking effect on or after 16 July 1964 to the first son of X (who is alive) to attain the age of 30, if X is survived by a son aged eight, the son would take at the age of 29: see 256 HL Official Report (5th series), 5 March 1964, cols 238, 239. It seems that, if there is more than one potential beneficiary, each is treated separately for the purposes of the Perpetuities and Accumulations Act 1964 s 4, so that the effect of the reduction in age does not affect the vesting age of others: see Maudsley's Modern Law of Perpetuities 142; Megarry and Wade's Law of Real Property (5th Edn) 270; Underhill's Law of Trusts and Trustees (14th Edn) 144. Thus, in the above example, had X been survived by children aged eight and five respectively, the vesting ages would have been 29 and 26 respectively.

13 Perpetuities and Accumulations Act 1964 s 4(1). Some, however, adopt a once and for all approach on the ground that there is only one disposition involved even though it concerns more than one person: see Cheshire and Burn's Modern Law of Real Property (14th Edn) 312; (1969) 27 Cambridge Law Journal 286-291; (1964) 80 LQR 509.

14 Eg 'to the children of X who being female attain the age of 25 years or being male attain the age of 30': see Morris and Leach's Rule against Perpetuities (2nd Edn), 1964 Supplement 12.

- 15 Perpetuities and Accumulations Act 1964 s 4 (2) (a).
- 16 *Ibid* s 4 (1): see *supra*.
- 17 *Ibid* s 4 (2) (b).
- 18 *Ibid* s 3: see PARA 1009 ante.
- 19 For the meaning of 'interest disposed of ' see PARA 1009 note 1 ante.
- 20 Perpetuities and Accumulations Act 1964 s 4(5).

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(iv) Limitations to Classes and to Members of Classes/A. INSTRUMENTS TAKING EFFECT PRIOR TO 16 JULY 1964/1071. Class gifts.

(iv) Limitations to Classes and to Members of Classes

A. INSTRUMENTS TAKING EFFECT PRIOR TO 16 JULY 1964

1071. Class gifts.

A limitation to a class is governed by the same principles as other limitations with respect to the rule against perpetuities, but the effect of the rule needs a separate statement. By a limitation to a class is meant¹ a limitation to a number of devisees or alienees, uncertain in number at the time of the gift, to be ascertained at a future time, all or some of whom² come within a certain category or description defined by a general or collective formula³, or within a number of such categories or descriptions⁴, who, if they are to take at all, are to take one divisible subject in certain proportionate shares⁵. In the case of such a limitation, all the interests of the members of the class must vest at the same time⁶, but the total and ultimate amount to be taken by any one donee cannot be ascertained until all the persons who are to take, and the ultimate proportions in which they are to take, are ascertained⁷.

In all cases it is the period of vesting, and not merely the description of the donees or the wide or indefinite character of the class, that produces the invalidity, if any, of the limitation⁸. The ordinary rules of construction as to ascertainment of a class may prevent the limitation from being void⁹.

1 As to class gifts generally see WILLS vol 50 (2005 Reissue) PARAS 465, 593 et seq. In *Kingsbury v Walter* [1901] AC 187 at 188, HL, Lord Halsbury LC, in considering whether a gift was a class gift, pointed out the danger of indulging in abstract propositions when it is a question of construing a particular will.

2 A gift to a class must be a gift to them as a class of persons having some common attribute and not a gift to them as individuals: *Re Chaplin's Trust* (1863) 12 WR 147; *Re Jackson, Shiers v Ashworth* (1883) 25 ChD 162 at 165 per Chitty J. A gift may, however, be nonetheless to a class because some of the individuals of the class are named eg to A and all other my nephews and nieces: *Kingsbury v Walter* [1901] AC 187 at 192, HL per Lord Davy. A gift to A and all the children of B is *prima facie* not a class gift, but may be so if there is a context showing that the testator intended it to be so: *Kingsbury v Walter* *supra* at 193. See also *Kekewich v Barker* (1903) 88 LT 130, HL; and see *Re Ramadge* [1969] NI 71 at 75 (gift to four named cousins in equal shares not a class gift).

3 See *Re Chaplin's Trust* (1863) 12 WR 147 at 148; *Pearks v Moseley, Re Moseley's Trusts* (1880) 5 App Cas 714 at 723, HL per Lord Selborne LC; *Kingsbury v Walter* [1901] AC 187 at 192, HL per Lord Davey (*prima facie* a class gift is a gift to a class consisting of persons who are included and comprehended under some general description and bear a certain relation to the testator). See also *Re Scorer, Burt v Harrison* (1924) 132 LT 529.

4 Eg a class composed of children and grandchildren, or a composite class composed of the children of A and the children of B.

5 *Pearks v Moseley, Re Moseley's Trusts* (1880) 5 App Cas 714 at 723, HL; *Re Hooper's Settlement Trusts, Bosman v Hooper* [1948] Ch 586, [1948] 2 All ER 261.

6 *Kingsbury v Walter* [1901] AC 187 at 194, HL per Lord Davey. See also *Re Drummond's Settlement, Foster v Foster* [1988] 1 All ER 449 at 453, [1988] 1 WLR 234 at 240, CA (where this paragraph is cited).

7 *Bentinck v Duke of Portland* (1877) 7 ChD 693 at 698 per Fry J. See also *Re Seely, Langton v Langton* (1920) 149 LT Jo 462.

8 *Leake v Robinson* (1817) 2 Mer 363 at 388 per Grant MR; *Blagrove v Hancock* (1848) 16 Sim 371.

9 Eg where upon the construction of the particular will the class is ascertained at the date of the will or at the death of the testator or of the tenant for life: *Harvey v Harvey* (1842) 5 Beav 134 (where 'grandchildren etc of A not from time to time in receipt of rents' was construed with the aid of a codicil to mean those living at the death of the tenant for life); *Leach v Leach* (1843) 2 Y & C Ch Cas 495 (where 'E and the other children of J' was construed to mean the children living at the date of the will); *Re Payne* (1858) 25 Beav 556 (class ascertained at death of tenant for life); *Wetherell v Wetherell* (1863) 1 De GJ & Sm 134; *Re Powell, Crosland v Holliday* [1898] 1 Ch 227 (class ascertained at the testator's death). See also WILLS vol 50 (2005 Reissue) PARA 602.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(iv) Limitations to Classes and to Members of Classes/A. INSTRUMENTS TAKING EFFECT PRIOR TO 16 JULY 1964/1072. Class living at remote event.

1072. Class living at remote event.

A limitation to such members of a class as are living at an event not necessarily within the perpetuity period, where the class consists partly of possibly unborn persons, is void¹.

A limitation to such of a class entirely composed of living persons who survive a certain event must, however, vest during the lifetime of one of them, if the limitation is to take effect at all, and is accordingly valid².

1 *Jee v Audley* (1787) 1 Cox Eq Cas 324; *Palmer v Holford* (1828) 4 Russ 403; *Dodd v Wake* (1837) 8 Sim 615 (gift to children of living person who should be living when eldest child attained 24): see the Law of Property Act 1925 s 163 (repealed as to instruments taking effect on or after 16 July 1964: see PARA 1009 note 2 and PARA 1070 ante) and the Perpetuities and Accumulations Act 1964 s 4 (1), (2) (see PARA 1070 ante). See also *Speakman v Speakman* (1850) 8 Hare 180; *Lett v Randall, Lett v Dormer* (1855) 3 Sm & G 83; *Stuart v Cockerell* (1870) 5 Ch App 713; *Re Harvey, Peek v Savory* (1888) 39 ChD 289, CA; *Re Bence, Smith v Bence* [1891] 3 Ch 242, CA; and *Gooding v Read* (1853) 4 De GM & G 510; *Goodier v Johnson* (1881) 18 ChD 441, CA; *Ward v Van der Loeff, Burnyeat v Van der Loeff* [1924] AC 653, HL.

2 *Lachlan v Reynolds* (1852) 9 Hare 796; *Re Watkins, James v Cordey* (1889) 37 WR 609, CA.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(iv) Limitations to Classes and to Members of Classes/A. INSTRUMENTS TAKING EFFECT PRIOR TO 16 JULY 1964/1073. Class ascertained by description.

1073. Class ascertained by description.

A limitation to a class of persons answering a given description, of which class any member may possibly have to be ascertained or be ascertainable for the first time at a period exceeding

the perpetuity period, is wholly void, even as to those members of the class who are ascertainable within that period¹, as the quantum of interest of those members is not ascertainable².

Where the class is defined as a part of a larger number of persons (as where the class is those of the children of a named person who attain a certain age, or survive a certain event, or satisfy any other condition or description), it is of no avail that the whole number of such persons is ascertainable within the perpetuity period, and the minimum interest of a member of the class ascertained in consequence³.

A limitation to a class consisting of or including the unborn children of a living person who attain an age greater than 21 is, therefore, wholly void for remoteness, as to every member of the class⁴, except where the limitation is, and takes effect as, a valid contingent remainder⁵, or the age of 21 is substituted for the greater age by statute⁶; or where, on the true construction of the gift, the class is entirely ascertained at or by reference to the death of the testator whose will contained the limitation or at the period of distribution which is on an event not too remote, so that the attainment of the age is not a condition precedent to vesting, but merely a direction for divesting or for the postponement of enjoyment. In all these excepted cases the limitation is valid⁷.

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies⁸, the 'wait and see' rule applies⁹; members are excluded from the class when it becomes established that their interests cannot vest within the period, and this process continues until the class is exhausted⁹.

1 *Jee v Audley* (1787) 1 Cox Eq Cas 324 (to the daughters of A and B his wife living at the failure of C's issue); referred to in *Cattlin v Brown* (1853) 11 Hare 372 at 377 as a strong case, because all the children actually existing might have taken and it was only the possibility that there might have been incapable children which excluded those who were capable. See also *Leake v Robinson* (1817) 2 Mer 363; *Blagrove v Hancock* (1848) 16 Sim 371; *Read v Gooding* (1856) 21 Beav 478; *Hancock v Watson* [1902] AC 14, HL; *Exham v Beamish* [1939] 1 IR 336 at 346; and the cases cited in note 4 infra. The recommendation of the Fourth Report of the Law Reform Committee (1956) (Cmd 18) PARAS 24, 25, that a 'wait and see' rule should be adopted was implemented by the Perpetuities and Accumulations Act 1964 s 4 (3), (4): see PARA 1075 post. Where it is impossible by statute (eg by virtue of the provision now contained in the Marriage Act 1949 s 2, which invalidates a marriage between persons either of whom is under the age of 16) for a gift to take effect beyond the period allowed by the rule, the gift is valid: *Re Gaites's Will Trusts*, *Banks v Gaites* [1949] 1 All ER 459. For a criticism of the reasoning of Roxburgh J in *Re Gaites's Will Trusts*, *Banks v Gaites* supra see Morris and Leach's Rule against Perpetuities (2nd Edn) 85, 86.

2 *Cattlin v Brown* (1853) 11 Hare 372 at 376; and see PARA 1020 ante.

3 *Smith v Smith* (1870) 5 Ch App 342; *Hale v Hale* (1876) 3 ChD 643 at 646; *Pearks v Moseley*, *Re Moseley's Trusts* (1880) 5 App Cas 714, HL (overruling *Re Moseley's Trusts* (1871) LR 11 Eq 499, where, as pointed out in *Hale v Hale* supra, the fact that the class might diminish was overlooked).

4 *Leake v Robinson* (1817) 2 Mer 363 at 390, where Grant MR said 'The bequests in question are not made to individuals but to classes; and what I have to determine is whether the class can take. I must make a new will for the testator if I split into portions his general bequest to the class'; *Re Hume*, *Public Trustee v Mabey* [1912] 1 Ch 693 at 698 per Parker J. See also *Evers v Challis* (1859) 7 HL Cas 531 (where a gift over took effect as a valid contingent remainder); *Hancock v Watson* [1902] AC 14, HL.

5 *Evers v Challis* (1859) 7 HL Cas 531; *Symes v Symes* [1896] 1 Ch 272; *Re Wrightson*, *Battie-Wrightson v Thomas* [1904] 2 Ch 95, CA (explained in *White v Summers* [1908] 2 Ch 256 at 267, 268 per Parker J); and see *Brackenbury v Gibbons* (1876) 2 ChD 417; *Re Finch*, *Abbiss v Burney* (1881) 17 ChD 211 at 221, 222 per Malins V-C (commenting on *Bull v Pritchard* (1847) 5 Hare 567). The actual decision in *Brackenbury v Gibbons* supra does not, however, appear to be correct, as the limitation in question could not take effect as a contingent remainder: see *Re Lechmere and Lloyd* (1881) 18 ChD 524; *Miles v Jarvis* (1883) 24 ChD 633; *Dean v Dean* [1891] 3 Ch 150. As to the validity of gifts taking effect as contingent remainders generally see PARA 1028 ante.

6 See the Law of Property Act 1925 s 163 (repealed as to instruments taking effect on or after 16 July 1964: see PARA 1009 note 2 and PARA 1070 ante), and the Perpetuities and Accumulations Act 1964 s 4 (1), (2) (see PARA 1070 ante).

7 *Elliott v Elliott* (1841) 12 Sim 276, where the class was held to be closed at the testator's death (followed with some reluctance in *Re Coppard's Estate, Howlett v Hodson* (1887) 35 ChD 350); and see *Kevern v Williams* (1832) 5 Sim 171 (where the class was held to be closed on death of the tenant for life). *Elliott v Elliott* supra and *Kevern v Williams* supra were criticised on the point of construction in *Re Ransome, Moberly v Ransome* [1957] Ch 348 at 359, 360, [1957] 1 All ER 690 at 695, 696. See also *Re Deeley's Settlement, Batchelor v Russell* [1974] Ch 454 at 464, [1973] 3 All ER 1127 at 1133, where Goff J said that, although one must not adopt a false or strained construction in order to avoid perpetuity, if words are ambiguous, then as between two possible constructions one of which infringes the rule and the other does not, one is bound to choose the latter. In that case he held that *Andrews v Partington* (1791) 3 Bro CC 401 did not apply and thus that the gift was not void for perpetuity. See also *Re Cockle's Will Trusts, Moreland (formerly Pittaway) v Draffen* [1967] Ch 690, [1967] 1 All ER 391; Gray's Rule against Perpetuities (4th Edn) ss 640, 641; and WILLS vol 50 (2005 Reissue) PARAS 597, 600. Cf Morris and Leach's Rule against Perpetuities (2nd Edn) 250-255. It seems that the rule in *Andrews v Partington* supra (see SETTLEMENTS vol 42 (Reissue) PARA 926; WILLS vol 50 (2005 Reissue) PARAS 598-599) may operate to validate a gift by closing the class when one member has attained the named age: see *Picken v Matthews* (1878) 10 ChD 264; *Re Mervin, Mervin v Crossman* [1891] 3 Ch 197 at 204, 205; *Re Ransome, Moberly v Ransome* supra at 360 and at 695, 696. Cf *Exham v Beamish* [1939] IR 336 (where the Irish court refused to apply this rule so as to validate a limitation). See also *Dodson v Hay* (1791) 3 Bro CC 405 (interest vested, enjoyment postponed); *Blease v Burgh* (1840) 2 Beav 221; *Hodson v Micklethwaite* (1854) 2 Drew 294; *Knox v Wells* (1864) 2 Hem & M 674 (interest vested at death of tenant for life); *Re Turney, Turney v Turney* [1899] 2 Ch 739, CA (vested interests, subject to being divested); *Re Tom's Settlement, Rose v Evans* [1987] 1 All ER 1081, [1987] 1 WLR 1021; *Re Drummond's Settlement, Foster v Foster* [1988] 1 All ER 449, [1988] 1 WLR 234, CA; and see PARA 1069 ante.

8 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

9 See *ibid* s 4 (3), (4) and PARA 1075 post. As to reduction of the age specified in a disposition to avoid remoteness see s 4 (1), (2) and PARA 1070 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(iv) Limitations to Classes and to Members of Classes/A. INSTRUMENTS TAKING EFFECT PRIOR TO 16 JULY 1964/1074. Class attaining twenty-one.

1074. Class attaining twenty-one.

A limitation can be well made to such of the unborn children of a living person as attain 21¹. This limitation may be extended to include in the class the children of any child who should die under 21 leaving issue at death², so that their interests would arise at birth, and all the shares would necessarily be ascertained within due limits of time. This further addition of grandchildren cannot, however, be made when the grandchildren are only to take if they attain 21, so that the condition of attaining that age is to apply to both children and grandchildren forming the composite class³. In this case the gift to the children cannot be severed from that to the grandchildren. Moreover, a limitation cannot be made generally to children of children of a living person whenever born, but the limitation is valid in a will where the class of children is expressly or impliedly closed at the testator's death⁴.

1 *Knapping v Tomlinson* (1864) 10 Jur NS 626. Thus, where the gift is to children of a class of persons, all ascertained at the testator's death on attaining 21, the gift is valid: *Re Chinnery's Estate* (1877) 1 LR Ir 296, Ir CA; *Re Hobson's Estate, Hobson v Sharp* [1907] VLR 724. This is the limit in a settlement, or in a will where the living person is not the testator himself. In view of advances in cryobiology it may no longer be accurate to say that a limitation to such of the unborn children of a living person as attain the age of 21 is necessarily valid. A gift vesting at the birth of an unborn child might not now satisfy the rule. See further PARA 1026 ante.

2 *Pearks v Moseley, Re Moseley's Trusts* (1880) 5 App Cas 714 at 719, HL per Lord Selborne LC.

3 *Seaman v Wood* (1856) 22 Beav 591; *Webster v Boddington* (1858) 26 Beav 128; *Re Moseley's Trusts* (1879) 11 ChD 555, CA; *affd* (1880) 5 App Cas 714, HL (overruling *Re Moseley's Trusts* (1871) LR 11 Eq 499); and see *Haworth v IRC* [1974] STC 378. The position is the same where the age to be attained in such a case is any other than 21: *Smith v Smith* (1870) 5 Ch App 342; *Hale v Hale* (1876) 3 ChD 643, approved in *Pearks v*

Moseley, Re Moseley's Trusts (1880) 5 App Cas 714. See further *Re Johnson, Pitt v Johnson* (1914) 30 TLR 505, CA; *Re Lord's Settlement, Martins Bank Ltd v Lord* [1947] 2 All ER 685, followed in *Re Hooper's Settlement Trusts, Bosman v Hooper* [1948] Ch 586, [1948] 2 All ER 261.

4 *Re Watkins, James v Cordey* (1889) 37 WR 609, CA; *Re Powell, Crosland v Holliday* [1898] 1 Ch 227; and see PARA 1071 note 9 ante. In *Re Ward, Ward v Ward* [1965] Ch 856, [1964] 3 All ER 442, Russell LJ refused to follow *Re Powell, Crosland v Holliday* supra, holding that a gift of income on discretionary trust for the children of four married children was a gift to grandchildren whenever born and, applying *Re Wenmoth's Estate, Wenmoth v Wenmoth* (1887) 37 ChD 266, holding that the rule of construction under which, in a gift to the children of A (A having children at the testator's death), the class was closed at the testator's death, was not applicable where the gift was of income as opposed to capital. See also *Re Cockle's Will Trusts, Moreland (formerly Pittaway) v Draffen* [1967] Ch 690, [1967] 1 All ER 391 (where a gift to the issue of the life tenant who, being male, attain the age of 21 or, being female, attain that age or marry was held valid on the ground that the testator's intention was that the class of issue should close at the death of the life tenant); *Re Rhodes, Vennell v Godby* [1961] NZLR 65 (NZ CA) (gift to issue of nephews and nieces selected from those living at life tenant's death, afterborn issue being excluded); *Re Deeley's Settlement, Batchelor v Russell* [1974] Ch 454, [1973] 3 All ER 1127 (inter vivos settlement where the necessity was emphasised of distinguishing between limitations to a finite class, such as children or grandchildren, and to an infinite class such as issue or descendants, when class-closing rules are under consideration). The context may show that the children of named persons only are intended (*Re Hobson's Estate, Hobson v Sharp* [1907] VLR 724), or that the class of descendants is ascertained at the death of a tenant for life (*Re Roberts, Repington v Roberts-Gawen* (1881) 19 ChD 520, CA).

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(iv) Limitations to Classes and to Members of Classes/B. INSTRUMENTS TAKING EFFECT ON OR AFTER 16 JULY 1964/1075. Exclusion of class members to avoid remoteness.

B. INSTRUMENTS TAKING EFFECT ON OR AFTER 16 JULY 1964

1075. Exclusion of class members to avoid remoteness.

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies¹, there is a significant departure from the common law² under which the gift to a class would be rendered void altogether by the possibility of an interest vesting outside the perpetuity period.

Thus, where the inclusion of any persons, being potential members³ of a class, or unborn persons who at birth would become members⁴ or potential members of the class, prevents the statutory age reduction provisions⁵ as well as the 'wait and see' rule⁶ from operating to save a disposition⁷ from being void for remoteness, those persons are thenceforth deemed for all the purposes of the disposition to be excluded from the class, and those provisions thereupon have effect accordingly⁸.

Where, in the case of other dispositions⁹, it is apparent at the time the disposition is made, or becomes apparent at a subsequent time, that the inclusion of any persons, being potential members of a class of unborn persons who at birth would become members or potential members of the class, would otherwise cause the disposition to be treated as void for remoteness, those persons, unless their exclusion would exhaust the class, are thenceforth deemed for all the purposes of the disposition to be excluded from the class¹⁰.

Where the above provisions have effect in relation to a disposition to which the 'wait and see' rule¹¹ applies, their operation does not affect the validity of anything previously done in relation to the interest disposed of¹² by way of advancement, application of intermediate income or otherwise¹³.

With regard to instruments to which the 1964 Act applies, the correct approach will, therefore, be first to apply the common law rule to see whether the disposition would have infringed it, and, if so, then to apply the 'wait and see' provisions of the Act¹⁴ to determine whether, in the

events which actually happen, it can be postulated that a particular interest cannot vest within the perpetuity period¹⁵. Once it becomes established in relation to any particular person that his interest cannot vest within the period, he is excluded from the class, and his prospective share will accrue for the benefit of those members or potential members of the class whose interests do so vest.

- 1 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.
- 2 See PARAS 1071-1074 ante.
- 3 As to when a person is to be treated as a potential member of a class see PARA 1011 note 9 ante.
- 4 As to when a person is to be treated as a member of a class see PARA 1011 note 8 ante.
- 5 I.e. the provisions of the Perpetuities and Accumulations Act 1964 s 4 (1), (2): see PARA 1070 ante.
- 6 I.e. *ibid* s 3 (1)-(3): see PARA 1009 ante.
- 7 For the meaning of 'disposition' see PARA 1009 note 1 ante.
- 8 Perpetuities and Accumulations Act 1964 s 4(3).
- 9 I.e. dispositions to which *ibid* s 4 (3) does not apply: see *supra*.
- 10 *Ibid* s 4 (4).
- 11 I.e. *ibid* s 3: see PARA 1009 ante.
- 12 For the meaning of 'interest disposed of ' see PARA 1009 note 1 ante.
- 13 Perpetuities and Accumulations Act 1964 s 4 (5). Thus eg an advancement to a person who is later excluded from the class is not invalidated.
- 14 See *ibid* s 3 (1)-(3) and PARA 1009 ante.
- 15 I.e. the period measured by the relevant statutory lives in being: see *ibid* s 3 (4), (5) and PARA 1011 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(iv) Limitations to Classes and to Members of Classes/C. VARIOUS FORMS OF GIFT/1076. Individual gifts.

C. VARIOUS FORMS OF GIFT

1076. Individual gifts.

Where there is a gift or devise of a given sum of money or amount of property to each member of a class, and the gift to each is wholly independent of the similar gift to every other member of the class, and can be neither augmented nor diminished, whatever the number of the other members may turn out to be, then the gift or devise may be good as to those members in fact ascertained within the limits of the perpetuity period¹. In cases of this kind the gift is a separate gift to each party, and is not a gift to a class in the strict legal sense of that term.

1 *Storrs v Benbow* (1853) 3 De GM & G 390; *Cattlin v Brown* (1853) 11 Hare 372 at 377 (the fifth rule enunciated by *Page Wood V-C*); *Wilkinson v Duncan* (1861) 30 Beav 111. *Blandford v Thackerell* (1793) 2 Ves 238 and *Liley v Hey* (1842) 1 Hare 580 appear to be examples of the application of this rule. See also *Re Seely*, *Langton v Langton* (1920) 149 LT Jo 462 (shares ascertained and segregated within the limits of the rule); *Davy*

v Clarke [1920] 1 IR 137. Cf *Re Barlow's Will Trusts* [1979] 1 All ER 296; sub nom *Re Barlow's Will Trusts, Royal Exchange Assurance v National Council of Social Service* [1979] 1 WLR 278.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(iv) Limitations to Classes and to Members of Classes/C. VARIOUS FORMS OF GIFT/1077. Gift of a fund in separate shares.

1077. Gift of a fund in separate shares.

Where there is a time fixed at which a fund is to be divided into separate shares, and that time is not obnoxious to the rule against perpetuities, then each share stands separate from the others, and the limitation of each share takes effect or not according as the dispositions of that share do or do not violate the rule, and the valid gift of one share is not made void by the invalidity of the gift of another share or portion of another share¹.

¹ See *Bentinck v Duke of Portland* (1877) 7 ChD 693 at 698 per Fry J. See also *Griffith v Pownall* (1843) 13 Sim 393; *Cattlin v Brown* (1853) 11 Hare 372 at 377 (the fifth rule enunciated by Page Wood V-C); *Wilson v Wilson* (1858) 4 Jur NS 1076; *Bell v Bell* (1862) 13 I Ch R 517, CA; *Knapping v Tomlinson* (1864) 10 Jur NS 626; *Re Coulman, Munby v Ross* (1885) 30 ChD 186; *Re Russell, Dorrell v Dorrell* [1895] 2 Ch 698, CA, applied in *Re Morrison's Will Trusts, Walsingham v Blathwayt* [1940] Ch 102, [1939] 4 All ER 332. Cf *Re Ferneley's Trusts* [1902] 1 Ch 543; *Re Game, Game v Tennent* [1907] 1 Ch 276; *Re Hey's Settlement Trusts, Hey v Nickell-Lean* [1945] Ch 294, [1945] 1 All ER 618. *Greenwood v Roberts* (1851) 15 Beav 92 has been the subject of discussion and criticism: see the explanation of the case in *Cattlin v Brown* supra at 379 and in *Webster v Boddington* (1858) 26 Beav 128 at 136, 137, which places it upon a ground which is reconcilable with the other authorities; and see the criticism in *Knapping v Tomlinson* supra; Gray's Rule against Perpetuities (4th Edn) s 391; and Jarman on Wills (8th Edn) 346-349. *Arnold v Congreve* (1830) 1 Russ & M 209 is overruled on this point: see *Knapping v Tomlinson* supra. See also *Re Seely, Langton v Langton* (1920) 149 LT Jo 462.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(iv) Limitations to Classes and to Members of Classes/C. VARIOUS FORMS OF GIFT/1078. Substitutionary clauses.

1078. Substitutionary clauses.

Where the limitation is first to a class of children or other issue absolutely, who are themselves ascertainable within a proper time, and a substitutionary clause is added giving the share of each one dying before distribution to a class of his or her issue not necessarily ascertainable within the perpetuity period, then, provided that the substitutionary clause is separated from the first absolute gift, the first absolute gift stands good, and the substitutionary clause only is invalid¹; but, if there is no absolute gift in the first instance, the whole is void².

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies³, the 'wait and see' rule⁴ applies and class members may be excluded to avoid remoteness⁵; the mere fact that the initial gift is not absolute will not render the limitation as a whole void.

¹ *Goodier v Johnson* (1881) 18 ChD 441, CA. The substitutionary clause is valid if the issue are necessarily ascertainable within the proper period: *Pearks v Moseley, Re Moseley's Trusts* (1880) 5 App Cas 714 at 719, HL.

² *Whitehead v Bennett* (1853) 22 LJ Ch 1020; *Webster v Boddington* (1858) 26 Beav 128 at 136, 137.

³ As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

4 See *ibid* s 3 (1)-(3) and PARA 1009 ante.

5 See *ibid* s 4 (3), (4) and PARA 1075 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(iv) Limitations to Classes and to Members of Classes/C. VARIOUS FORMS OF GIFT/1079. Settlement of shares.

1079. Settlement of shares.

A direction for settlement of each share is severable among the shares, and takes effect as to those members of the class living at the time when the instrument comes into operation¹ even though void as to other members. There must be an absolute gift of each share in the first place². A forfeiture clause in such a settlement is similarly severable³.

1 *Wilson v Wilson* (1858) 4 Jur NS 1076; *Re Boyd, Nield v Boyd* (1890) 63 LT 92; *Re Russell, Dorrell v Dorrell* [1895] 2 Ch 698, CA.

2 *Lassence v Tierney* (1849) 1 Mac & G 551; *Hancock v Watson* [1902] AC 14, HL; and see *Re Abrahams' Will Trusts, Caplan v Abrahams* [1969] 1 Ch 463 at 485, 486, [1967] 2 All ER 1175 at 1191, 1192.

3 *Hodgson v Halford* (1879) 11 ChD 959.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(v) Limitations to Series of Persons/1080. Limitation to a series.

(v) Limitations to Series of Persons

1080. Limitation to a series.

If the limitation is to a series of individuals answering a given description, and the first member of the series intended to take may by possibility be a person excluded by the rule against perpetuities, no person whatever can take under the limitation¹; but, if the first members of the series are not excluded by the rule, they may take provided that their interests are severable².

Where, however, the limitation is in an instrument to which the Perpetuities and Accumulations Act 1964 applies³, the mere possibility of a person taking outside the perpetuity period will no longer render the gift wholly invalid; the 'wait and see' rule⁴ applies, and a disposition will not be treated as void for remoteness by reason only of the interest disposed of being ulterior to and dependent upon an interest which is so void⁵. For the purposes of the 1964 Act, each disposition succeeds or fails on its own merits and is treated as valid until such time as it becomes established that it cannot vest within the perpetuity period⁶; and its being so established will not prevent the vesting of a subsequent disposition from being accelerated⁷.

1 *Lord Dungannon v Smith* (1845) 12 Cl & Fin 546, HL; *Cattlin v Brown* (1853) 11 Hare 372 at 376 (the third rule enunciated by Page Wood V-C, where it is stated that no person can take if 'any' member is an excluded person).

2 *Lord Dungannon v Smith* (1845) 12 Cl & Fin 546, HL. The first taker satisfying the description when the instrument takes effect has been held in some cases upon the intention of the particular will, to take chattels

absolutely (*Mackworth v Hinxman* (1836) 2 Keen 658 (criticised by Sugden LC in *Ker v Lord Dungannon* (1841) 1 Dr & War 509 at 537, 538; Sugden's Law of Property 341n; and see Gray's Rule against Perpetuities (4th Edn) s 399 note (1)); *Montagu v Lord Inchiquin* (1875) 23 WR 592, explained in *Re Johnson, Cockerell v Earl of Essex* (1884) 26 ChD 538 at 547); or a fee simple in realty (*Charitable Donations and Bequests Comrs v Baroness de Clifford* (1841) 1 Dr & War 245; Lewis's Law of Perpetuity 476). In *Lady Tollemache v Earl and Countess of Coventry* (1834) 2 Cl & Fin 611, HL, the reasons given were perhaps equally destructive of the estate of the first taker as of that of the second, who was immediately concerned: see *Lord Dungannon v Smith* supra; *Ker v Lord Dungannon* supra at 536; Sugden's Law of Property 330. Whether the actual decision in *Lady Tollemache v Earl and Countess of Coventry* supra was that the first of the series took absolutely was doubted by some of the judges in *Lord Dungannon v Smith* supra, but in *Re Hill, Hill v Hill* [1902] 1 Ch 807 at 810, CA, Vaughan Williams LJ expressed and gave reasons for the opinion that the decision of the House of Lords was to that effect. A life estate expressly limited to a first taker is valid even though the remainder on that estate or the absolute interest may be invalidly given: *Re Gage, Hill v Gage* [1898] 1 Ch 498, referred to in *Re Chardon, Johnston v Davies* [1928] Ch 464. As to life estates to unborn persons see PARA 1067 et seq ante.

3 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

4 See *ibid* s 3 (1)-(3) and PARA 1009 ante.

5 See *ibid* s 6 and PARAS 1082, 1088 post. As to dispositions to a class see PARA 1075 ante.

6 See *ibid* s 3 and the text and note 4 supra.

7 See *ibid* s 6 and PARA 1088 post.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(v) Limitations to Series of Persons/1081. Chattels settled as realty.

1081. Chattels settled as realty.

The application of the rule against perpetuities to chattels settled as realty is qualified by the fact that, since 31 December 1925, entailed interests can by statute be created in personal estate by the like expressions as those by which an estate tail could formerly have been created by deed in freehold land and that such an entailed interest can be barred¹.

Subject to this statutory provision, a trust of chattels to be enjoyed as heirlooms with real estate, or to devolve in a course of descent applicable to real estate, is as a general rule to be construed as conferring an absolute interest on the first person who becomes entitled to an estate of inheritance in the real estate², even though at the date of a person becoming so entitled the perpetuity period has not expired³. This rule may be modified by an appropriate provision in the settlement⁴, but any such provision is void if it transgresses the rule against perpetuities⁵.

Where there is a trust of chattels, in which the absolute interest is expressly given only to a person whose description causes him to be excluded by the rule against perpetuities, for example an unborn person who may not answer the required description within the proper period, and there is a trust in the meantime for persons successively entitled to real estate, or for persons successively satisfying a certain description, the interests of successive takers under the latter gift cannot take effect beyond life interests of persons who must necessarily be in actual existence at the time of the creation of the trust⁶.

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies⁷, the 'wait and see' rule will, however, apply⁸. Thus the mere possibility of a person's not answering a certain description within the perpetuity period will not cause him to be excluded; nor need the interests of successive takers be limited by reference to lives of persons necessarily in existence at the creation of the trust; until it becomes established that a person must satisfy the requisite description, or, in the case of each successive taker, that his interest must vest, if

at all, outside the perpetuity period, their respective interests are to be treated as if they were not subject to the rule against perpetuities.

1 Law of Property Act 1925 s 130 (1). Where chattels directed to be held as heirlooms are after 31 December 1925 directed to be enjoyed or held with, or upon trusts corresponding to trusts affecting land in which a subsisting entailed interest has been created, the direction creates a corresponding entailed interest in the chattels: s 130 (3) (which is to be construed strictly: *Re Jones, Public Trustee v Jones* [1934] Ch 315 at 319). See further SETTLEMENTS vol 42 (Reissue) PARA 939. As to the exception from the rule against perpetuities in favour of interests defeasible by disentail see PARA 1049 et seq ante.

2 See SETTLEMENTS vol 42 (Reissue) PARA 937.

3 *Countess of Harrington v Earl of Harrington* (1871) LR 5 HL 87 at 101, 102; *Re Hill, Hill v Hill* [1902] 1 Ch 807 at 810, 811, CA; cf *Re Steele's Will Trusts, National Provincial Bank Ltd v Steele* [1948] Ch 603, [1948] 2 All ER 193.

4 Thus provisions defeating the interest of a tenant in tail by purchase who dies under 21 or who does not come into actual possession of the land have been held valid: see SETTLEMENTS.

5 *Portman v Viscount Portman* [1922] 2 AC 473, HL (chattels settled to go with mansion house; shifting clause in settlement of mansion house which was not limited in time; shifting clause void as to chattels and not saved by use in settlement of chattels of words 'so far as the rule of law and equity permit'; cf para 1024 note 4 ante); *Re Hind, Bernstone v Montgomery* [1933] 1 Ch 208 at 225; *Gormanston v Gormanston* [1923] 1 IR 137 (provision preventing vesting in any tenant in tail unless he attained 21 and extending to tenants in tail by descent as well as to tenants in tail by purchase). Cf *Christie v Gosling* (1866) LR 1 HL 279; *Martelli v Holloway* (1872) LR 5 HL 532 (where similar provisions were on construction confined to tenants in tail by purchase).

6 *Ibbetson v Ibbetson* (1840) 5 My & Cr 26 (followed in *Lord Dungannon v Smith* (1845) 12 Cl & Fin 546, HL, and *Re Atkinson, Atkinson v Atkinson* [1916] 1 Ch 91); *Wainman v Field* (1854) Kay 507. In *Trafford v Trafford* (1746) 3 Atk 347 the objection of remoteness was not considered (see *Countess of Lincoln v Duke of Newcastle* (1806) 12 Ves 218 at 231, HL) and the case is no longer good law (*Lord Dungannon v Smith* supra; Lewis's Law of Perpetuity 654). In *Mackworth v Hinxman* (1836) 2 Keen 658, the gift of corpus, which was too remote, appears to have been ignored: see *Ker v Lord Dungannon* (1841) 1 Dr & War 509 at 537, 538. In *Bacon v Proctor* (1822) Turn & R 31, no declaration was made as to the title beyond a life estate.

7 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

8 See *ibid* s 3 (1)-(3) and PARA 1009 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(vi) Alternative Independent Limitations/1082. Alternative limitations.

(vi) Alternative Independent Limitations

1082. Alternative limitations.

Either of two limitations which are expressed to take effect independently and in the alternative may take effect notwithstanding that the other is void¹. Similarly, an ultimate limitation creating a future interest which becomes vested in interest within the limits of the rule against perpetuities is valid, although preceded by, but wholly independent of, earlier trusts which are avoided by the rule².

A single gift which is expressed to be limited contingently on one or other of two or more separate events, of which one is too remote under the rule and the other not, may take effect on the latter contingency³, even though void so far as it depends upon the former.

Such a limitation is known as a limitation with a double aspect⁴. In effect, it comprises two or more alternative independent limitations⁵.

Where the Perpetuities and Accumulations Act 1964 applies⁶, the disposition, in so far as it depends upon the occurrence of the potentially remote contingency, will not be treated as void for remoteness until such time, if any, as it becomes established that the contingency must occur, if at all, outside the perpetuity period⁷ calculated by reference to the Act⁸. Thus, for example, in a gift by will 'to A's first child to marry in A's lifetime or to climb Everest' (A having no child at the date of the testator's death), the former contingency is valid without reference to the Act, but the latter must be subjected to the statutory 'wait and see' rule⁹, and, if it occurs first, will cause the interest to vest. Furthermore, even if the limitations are not independent, the gift may still be good since the Act provides that no disposition¹⁰ is to be treated as void for remoteness by reason only that the interest disposed of¹¹ is ulterior to and dependent upon an interest under a disposition which is so void¹².

1 *Vachel v Vachel* (1669) 1 Cas in Ch 129 at 130; *Crompe v Barrow* (1799) 4 Ves 681; *Re Davey, Prisk v Mitchell* [1915] 1 Ch 837, CA (where an ultimate gift over, after gifts void for remoteness, was held valid as an alternative and independent gift). See also the cases cited in note 3 *infra* and PARA 1083 post.

2 *Re Allan's Will Trusts, Curtis v Nalder* [1958] 1 All ER 401 at 404, [1958] 1 WLR 220 at 223, 224, following *Re Coleman, Public Trustee v Coleman* [1936] Ch 528, [1936] 2 All ER 225; and see *Re Hubbard's Will Trusts, Marston v Angier* [1963] Ch 275 at 286, 287, [1962] 2 All ER 917 at 922, 923; *Re Buckton's Settlement Trusts, Public Trustee v Midland Bank Executor and Trustee Co Ltd* [1964] Ch 497 at 505, [1964] 2 All ER 487 at 491. See also PARA 1088 text and note 10 post.

3 *Longhead v Phelps* (1770) 2 Wm Bl 704; *Porter v Bradley* (1789) 3 Term Rep 143; *Leake v Robinson* (1817) 2 Mer 363 at 394; *Minter v Wraith* (1842) 13 Sim 52; *Goring v Howard* (1848) 16 Sim 395; *Monypenny v Dering* (1852) 2 De GM & G 145 at 181; *Cambridge v Rous* (1858) 25 Beav 409 (in all of which cases there was a gift on failure of issue at the death of an ancestor, as well as on failure of issue taking a vested interest); *Miles v Harford* (1879) 12 ChD 691; *Re Bowles, Page v Page* [1905] 1 Ch 371; *Earl of Bandon v Moreland* [1910] 1 IR 220; *Re Davies and Kent's Contract* [1910] 2 Ch 35, CA; *Re Curryer's Will Trusts, Wyly v Curryer* [1938] Ch 952, [1938] 3 All ER 547; and see *De Vere's Will Trusts, Jellett v O'Brien* [1961] IR 224 at 236. As to *Evers v Challis* (1859) 7 HL Cas 531 see PARA 1084 text and note 5 post.

4 *Luddington v Kime* (1697) 1 Ld Raym 203 at 208; and see *Porter v Bradley* (1789) 3 Term Rep 143 at 147 per Lord Kenyon CJ; *Ring v Hardwick* (1840) 2 Beav 352 at 358 per Lord Langdale MR; *Lewis's Law of Perpetuity* 503. See also *Re Bullock's Will Trusts, Bullock v Bullock* [1915] 1 Ch 493 at 502, followed in *Re Garnham, Taylor v Baker* [1916] 2 Ch 413.

5 *Monypenny v Dering* (1852) 2 De GM & G 145 at 183 (followed in *Re Curryer's Will Trusts, Wyly v Curryer* [1938] Ch 952, [1938] 3 All ER 574); *Re Bowles, Page v Page* [1905] 1 Ch 371; *Re Davies and Kent's Contract* [1910] 2 Ch 35 at 46, CA.

6 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

7 See *ibid* s 3 and PARA 1009 ante.

8 The lives in being available under the 1964 Act may not be the same as those available at common law: see Maudsley's *Modern Law of Perpetuities* 185, 186.

9 See the Perpetuities and Accumulations Act 1964 s 3 (1) and PARA 1009 ante.

10 For the meaning of 'disposition' see PARA 1009 note 1 ante.

11 For the meaning of 'interest disposed of' see PARA 1009 note 1 ante.

12 See the Perpetuities and Accumulations Act 1964 s 6 and PARAS 1084, 1088 post.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(vi) Alternative Independent Limitations/1083. Limitations contingent on the exercise of a power.

1083. Limitations contingent on the exercise of a power.

There may be an alternative independent gift to a class, valid if a power has not been exercised in a certain way, but capable of being invalidated by the exercise of the power. The explanation of such cases is referable to the distinctive legal qualities of a power and of the estate created by a power¹. For example, where there is a gift to children with power to appoint life estates to a husband or wife, and an ultimate gift to grandchildren living at the determination of the prior interests, including any appointed to the husband or wife, the gift to the grandchildren is valid if the power has not been exercised or has been exercised only in favour of a husband or wife born in the lifetime of the original testator, because the class of grandchildren would be ascertained within due time². The gift to the grandchildren may, however, be invalidated if the children's power is exercised in favour of a husband or wife not born in the lifetime of the original testator. In the latter event, the class of grandchildren would not be ascertained until a period too remote. If, instead of a power to appoint life estates to a husband or wife, life estates had been given to husband or wife and the class of children to take was not to be ascertained until the death of the survivor of the husband and wife, the whole gift would be bad for perpetuity, and there would be no independent valid alternative gift³.

Powers given to a series of persons may likewise be severable, so that an appointment exercised by one of the series may be valid, although it might be invalid if exercised by another⁴.

1 *Re Davies and Kent's Contract* [1910] 2 Ch 35 at 47, CA, approving *Re Bowles, Page v Page* [1905] 1 Ch 171.

2 *Re Davies and Kent's Contract* [1910] 2 Ch 35, CA. This case and *Re Bowles, Page v Page* [1905] 1 Ch 371, have been cited as illustrating the distinction between a power which is itself void and a power which is itself good although some particular exercise of it may infringe the rule against perpetuities: see *Re Watson's Settlement Trusts, Dawson v Reid* [1959] 2 All ER 676 at 681, [1959] 1 WLR 732 at 739.

3 *Re Bowles, Page v Page* [1905] 1 Ch 371 at 376 per Farwell J. Where the Perpetuities and Accumulations Act 1964 applies, a disposition limited by reference to the time of death of the survivor of a person in being at the commencement of the perpetuity period and any spouse of the person will not be invalidated merely by reason of the possibility of the survivor's death occurring outside the perpetuity period; and, where the survivor does not die within the period, the disposition is treated as if limited by reference to a time immediately before the end of the perpetuity period if to do so would save it from being void for remoteness: see s 5 and PARA 1022 ante.

4 See PARA 1093 post.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(4) APPLICATION OF THE RULE IN GENERAL/(vi) Alternative Independent Limitations/1084. Necessity for expression of double contingency.

1084. Necessity for expression of double contingency.

The double contingency in the cases previously mentioned¹ must be so expressed in the instrument². A gift single in point of expression cannot be split, even though it may include two or more events one of which may or does happen within the limits of the perpetuity rule³.

An exception to this rule exists in the case of limitations taking effect before 1 January 1926⁴. This exception is founded on the principle of real property law that, if a devise could take effect as a remainder, it should do so. Where a gift over, single in expression, could, in the event which had happened, take effect as a contingent remainder, it was allowed to take effect as such, even though, had another event happened, it would have been void for remoteness as an executory devise⁵.

In relation to dispositions under instruments taking effect on or after 16 July 1964⁶, expression of the double contingency is not vital since the 'wait and see' rule⁷ will be available, and the mere fact that an interest disposed of is ulterior to and dependent upon an interest which is established to be void for remoteness will not cause the ulterior interest to be void⁸.

1 See PARAS 1082, 1083 ante.

2 *Miles v Harford* (1879) 12 ChD 691 at 702 (cited and followed in *Re Curryer's Will Trusts*, *Wyly v Curryer* [1938] Ch 952 at 954, 955, [1938] 3 All ER 574 at 576); *Re Harvey*, *Peek v Savory* (1888) 39 ChD 289 at 298, CA; *Re Bence*, *Smith v Bence* [1891] 3 Ch 242 at 249, CA; *Hancock v Watson* [1902] AC 14, HL.

3 *Proctor v Bishop of Bath and Wells* (1794) 2 Hy Bl 358; *Lord Dungannon v Smith* (1845) 12 Cl & Fin 546, HL; *Monypenny v Dering* (1852) 2 De GM & G 145 at 183; *Re Thatcher's Trusts* (1859) 26 Beav 365; *Re Harvey*, *Peek v Savory* (1888) 39 ChD 289, CA; *Re Bence*, *Smith v Bence* [1891] 3 Ch 242 at 249, CA; *Hancock v Watson* [1902] AC 14 at 18, HL; *Re Curryer's Will Trusts*, *Wyly v Curryer* [1938] Ch 952, [1938] 3 All ER 574; *Re Mill's Declaration of Trust*, *Midland Bank Executor and Trustee Co Ltd v Mill* [1950] 2 All ER 292, CA. In *Watson v Young* (1885) 28 ChD 436 the contingency was split, but it is doubtful whether the case is correct: see *Re Bence*, *Smith v Bence* supra.

4 As to the conversion of contingent remainders into equitable interests, and as to the validity as remainders before 1 January 1926 of certain interests which might be invalid if limited as executory devises, see generally para 1028 ante. A quasi-exception, as pointed out by Lewis's Law of Perpetuity 367, 509, and Gray's Rule against Perpetuities (4th Edn) ss 356-360, also occurred where personalty was bequeathed to a series of unborn persons by words which would create successive estates tail if the subject of the limitation were real estate. In such cases, if the gift to the first of the series failed, eg by death without issue in the testator's lifetime, the gift to the second of the series might take effect, although it would have been bad if the first taker had survived the testator. In *Marsh v Marsh* (1783) 1 Bro CC 293, *Wilkinson v South* (1798) 7 Term Rep 555, and *Williams v Lewis* (1859) 6 HL Cas 1013 at 1024, a limitation of personalty on a failure of issue was treated as a limitation with a double aspect. See also *Lady Pelham v Gregory* (1760) 3 Bro Parl Cas 204, HL; *Brown v Higgs* (1799) 4 Ves 708; *Re Lowman*, *Devenish v Pester* [1895] 2 Ch 348, CA. As to the power since 31 December 1925 to create entailed interests in personalty see PARA 1081 ante.

5 *Evers v Challis* (1959) 7 HL Cas 531 (where a gift over in default of A leaving a child who being a son should attain 23, or being a daughter should attain 21, took effect, on the death of A without ever having had a child, as a contingent remainder). In *Proctor v Bishop of Bath and Wells* (1794) 2 Hy Bl 358, the limitation could not take effect as a remainder in any case. *Watson v Young* (1885) 28 ChD 436 (where Pearson J purported to follow *Evers v Challis* supra) was doubted in *Re Bence*, *Smith v Bence* [1891] 3 Ch 242. The exception has no relation to personal estate: *Re Thatcher's Trusts* (1859) 26 Beav 365; *Hancock v Watson* [1902] AC 14, HL.

6 Ie the commencement date of the Perpetuities and Accumulations Act 1964.

7 See *ibid* s 3 (1) and PARAS 1009, 1082 ante.

8 See *ibid* s 6 para 1082 ante, 1088 post.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(5) FAILURE OF A LIMITATION UNDER THE RULE/(i) Effect in general/1085. Effect of failure.

(5) FAILURE OF A LIMITATION UNDER THE RULE

(i) Effect in general

1085. Effect of failure.

The general effect of a limitation being void under the rule against perpetuities is that the instrument takes effect as if the void limitation and all limitations dependent upon it were omitted¹.

If a gift over is void, the limitation prior to it and made defeasible by it becomes free from the gift over, and may become indefeasible². A prior limitation of an estate is, however, as a general rule not affected by the failure of a limitation arising on the expiration of the prior estate³. In a series of limitations every part which is valid in itself, and can be separated from those parts which are void, is upheld⁴.

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies⁵, a disposition⁶ does not, however, fail merely because it is preceded by and dependent upon an interest under a disposition which is void for remoteness⁷.

1 Lewis's Law of Perpetuity 657; and see *Re Backhouse, Findlay v Backhouse* [1921] 2 Ch 51 (commented on in *Re Coleman, Public Trustee v Coleman* [1936] Ch 528, [1936] 2 All ER 225; and see *Re Hubbard's Will Trusts, Marston v Angier* [1963] Ch 275 at 290, [1962] 2 All ER 917 at 925, where Buckley J preferred the decision in *Re Coleman, Public Trustee v Coleman* supra to that of *Re Backhouse, Findlay v Backhouse* supra); *Re Sahal's Will Trusts, Alliance Assurance Co Ltd v A-G* [1958] 3 All ER 428, [1958] 1 WLR 1243.

2 See the cases of gifts on general failure of issue cited in PARA 1024 note 2 ante; *Doe d Blesard v Simpson* (1842) 3 Man & G 929, Ex Ch; *Taylor v Frobisher* (1852) 5 De G & Sm 191; *James v Lord Wynford* (1852) 1 Sm & G 40 at 57; *Courtier v Oram* (1855) 21 Beav 91; *Webster v Parr* (1858) 26 Beav 236 at 238; *Hodgson v Halford* (1879) 11 ChD 959; *Goodier v Johnson* (1881) 18 ChD 441 at 446, CA; *Re Baillie, Faithful v Sydney Industrial Blind Institution* (1907) 7 SRNSW 265; *Re Tyrrell's Estate* [1907] 1 IR 292, Ir CA; *Re Earl of Donoughmore's Estate* [1911] 1 IR 211; *Re Pratt's Settlement Trusts, McCullum v Phipps-Hornby* [1943] Ch 356, [1943] 2 All ER 458; Lewis's Law of Perpetuity 532, 657; Gray's Rule against Perpetuities (4th Edn) s 247.

3 *Garland v Brown* (1864) 10 LT 292, followed in *Re Ashforth, Sibley v Ashforth* [1905] 1 Ch 535; *Re Coleman, Public Trustee v Coleman* [1936] Ch 528, [1936] 2 All ER 225.

4 *Gooding v Read* (1853) 4 De GM & G 510. As to limitations to a series of persons, some of whom may not be ascertainable within the perpetuity period, see PARA 1080 ante.

5 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

6 For the meaning of 'disposition' see PARA 1009 note 1 ante.

7 See the Perpetuities and Accumulations Act 1964 s 6 and PARA 1088 post. Section 6 implements the recommendations in the Fourth Report of the Law Reform Committee (1956) (Cmd 18) PARAS 32, 33.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(5) FAILURE OF A LIMITATION UNDER THE RULE/(i) Effect in general/1086. Devolution of interest invalidly limited.

1086. Devolution of interest invalidly limited.

The estate or interest which is the subject of the void limitation devolves as on failure of the limitation for other causes, for example in case of a settlement to the settlor or grantor¹, and in case of a will, as on a lapse, to the residuary legatee or devisee², or, if the limitation is itself of residue or there is no residuary gift, to the persons entitled as on intestacy³, and, in case of the exercise of a special power, to the persons entitled in default of appointment⁴.

1 *Re Morse's Settlement* (1855) 21 Beav 174 at 180; *Re Slark's Trusts* (1872) 21 WR 165.

2 *Leake v Robinson* (1817) 2 Mer 363 at 392; *Bentinck v Duke of Portland* (1877) 7 ChD 693 at 700.

3 *Proctor v Bishop of Bath and Wells* (1794) 2 Hy Bl 358; *Stuart v Cockerell* (1870) 5 Ch App 713 at 716; *Bentinck v Duke of Portland* (1877) 7 ChD 693. Where a testator carves a chattel interest out of his real estate and makes it the subject of remote limitations, it results to his heir with the character of personal estate which the testator impressed upon it: *Burley v Evelyn* (1848) 16 Sim 290 at 295; but see PARA 1087 note 2 post.

4 See further PARA 1107 post.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(5) FAILURE OF A LIMITATION UNDER THE RULE/(i) Effect in general/1087. Devolution subject to valid directions.

1087. Devolution subject to valid directions.

The property devolves subject to such directions as are validly imposed¹. Where, therefore, the destination of property depends upon its having the character of real estate or personal estate, real estate held on a valid trust for sale, if the trusts of the proceeds of sale fail for remoteness, devolves as real estate under the doctrine of reconversion upon trust for the person entitled in default of disposition²; and, where a trust for sale of real estate is void for remoteness, but the trusts of the proceeds are valid, the beneficiaries take the property as realty³.

1 *Tregonwell v Sydenham* (1815) 3 Dow 194, HL; *Re O'Brien's Estate, Prytz v Trustees, Executors and Agency Co Ltd* (1898) 24 VLR 360 (trust for maintenance).

2 See EQUITY vol 16(2) (Reissue) PARA 711. The old rules of descent by which real estate devolved on an intestacy upon the heir-at-law have been in general abolished as regards death after 31 December 1925 and the same rules of intestate succession apply to all property whether real or personal: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 583.

3 See EQUITY vol 16(2) (Reissue) PARA 711.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(5) FAILURE OF A LIMITATION UNDER THE RULE/(i) Effect in general/1088. Effect on subsequent limitations.

1088. Effect on subsequent limitations.

At common law every limitation on the failure, or expectant on the determination, or in defeasance, of a limitation void under the rule against perpetuities, is void¹. This applies even though the subsequent limitation is to a person actually existing, who would otherwise take a vested interest², and even though that person only takes an interest for his own life³. The cases in which the question has arisen fall into three categories⁴:

- 41 (1) where a testator or settlor settles property in such a way as to create a series of successive interests each intended to take effect upon, and only upon, the exhaustion or termination of all antecedent interests in the chain; in this case, if one of the interests is void for remoteness, all the ulterior interests will fail notwithstanding that they must take effect if at all within the perpetuity period⁵;
- 42 (2) where the testator or settlor so frames his trusts as to create an interest which will not take effect in possession until a future date but must vest in interest within the perpetuity period and the enjoyment of that interest in possession is not

- dependent upon the prior exhaustion of the antecedent interests; in this case, that future interest will be unaffected by remoteness of any of the antecedent interests⁶;
- 43 (3) where the testator or settlor gives property to A, either immediately or at some future date which is not too remote, but so frames the trusts that A's interest may be displaced by the exercise of some power or discretion; in this case, A's interest will be unaffected by any invalidity of that power or discretion on the ground of remoteness⁷.

In every case it is a question of construction whether the prior contingency is expressly or impliedly imported into the subsequent limitations⁸; if it is, they are void; but, if not, they take effect as independent or alternative limitations and may be valid⁹. Where, for example, a limitation creates a future interest which becomes vested in interest (although not in possession) within the limits of the rule against perpetuities and cannot be divested by the operation of earlier trusts, it is valid, although preceded by invalid trusts¹⁰. Limitations in default of appointment are also unaffected by a void power of appointment¹¹.

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies¹², a disposition¹³ is not, however, to be treated as void for remoteness by reason only that the interest disposed of¹⁴ is ulterior to and dependent upon an interest under a disposition which is so void, and the vesting of an interest is not to be prevented from being accelerated¹⁵ on the failure of a prior interest by reason only that the failure arises because of remoteness¹⁶. Once it becomes established under the 'wait and see' rule¹⁷ (if applicable) that a prior disposition cannot vest within the perpetuity period, the subsequent disposition can be considered and, where appropriate, vesting accelerated.

1 *Robinson v Hardcastle* (1788) 2 Term Rep 241, 380, 781; *Proctor v Bishop of Bath and Wells* (1794) 2 Hy Bl 358 (where the point was said to have been expressly decided in *Earl of Chatham v Tothill* (1771) 7 Bro Parl Cas 453, HL); *Routledge v Dorril* (1794) 2 Ves 357 at 363; *Brudenell v Elwes* (1801) 1 East 442; *Beard v Westcott* (1822) Turn & R 25 (agreeing with the opinion of the King's Bench (see (1822) 5 B & Ald 801) and differing from that of the Common Pleas (see (1813) 5 Taunt 393) on questions stated for its opinion); Lewis's Law of Perpetuity 660.

2 *Monypenny v Dering* (1852) 2 De GM & G 145 at 181; *Re Thatcher's Trusts* (1859) 26 Beav 365. The point was accordingly assumed without argument in *Re Mortimer, Gray v Gray* [1905] 2 Ch 502, CA, a case under the old rule in *Whitby v Mitchell* (see PARA 1003 ante), where the person would otherwise have taken a vested interest; and see (1911) 27 LQR 112. The ground given is that the limitation over was never intended to take effect if the persons intended to take under the prior limitations would, if they had been alive, have been capable of enjoying the estate: see *Monypenny v Dering* supra at 181; *Re Manning's Trusts* (1915) 49 ILT 143 (cited in PARA 1067 note 8 ante); *Re Ramadge's Settlement, Hamilton v Ramadge* [1919] 1 IR 205. The rule is based on the settlor's intention: see *Re Hubbard's Will Trusts, Marston v Angier* [1963] Ch 275 at 284, [1962] 2 All ER 917 at 921. See also *Re Abbott, Peacock v Frigout* [1893] 1 Ch 54 at 57.

3 *Beard v Westcott* (1822) 5 B & Ald 801; *Monypenny v Dering* (1852) 2 De GM & G 145; *Re Hewett's Settlement, Hewett v Eldridge* [1915] 1 Ch 810 (explaining *Re Norton, Norton v Norton* [1911] 2 Ch 27). See, however, Gray's Rule against Perpetuities (4th Edn) ss 252-257; Cheshire and Burn's Modern Law of Real Property (14th Edn) 293. Cf *Re Canning's Will Trusts, Skues v Lyon* [1936] Ch 309 (limitations in themselves valid, which follow, but are not dependent upon, limitations offending the rule against perpetuities, are not affected by the invalidity of the prior limitations). See also *Re Hubbard's Will Trusts, Marston v Angier* [1963] Ch 275 at 289, [1962] 2 All ER 917 at 924. In *Re Hubbard's Will Trusts, Marston v Angier* supra at 285 and at 922 Buckley J acknowledged the criticism in Gray's Rule against Perpetuities (4th Edn) ss 252-257 as cogent but against the weight of authority.

4 See *Re Hubbard's Will Trusts, Marston v Angier* [1963] Ch 275 at 284-288, [1962] 2 All ER 917 at 921-924; *Re Buckton's Settlement Trusts, Public Trustee v Midland Bank Executor and Trustee Co Ltd* [1964] Ch 497, [1964] 2 All ER 487; and see *Re Leek, Darwen v Leek* [1967] Ch 1061 at 1078, [1967] 2 All ER 1160 at 1166 (affd on different grounds [1969] 1 Ch 563 at 580, 581, [1968] 1 All ER 793 at 798, CA).

5 *Re Hubbard's Will Trusts, Marston v Angier* [1963] Ch 275 at 284, [1962] 2 All ER 917 at 921. See also *Beard v Westcott* (1822) 5 B & Ald 801. *Re Buckton's Settlement Trusts, Public Trustee v Midland Bank Executor and Trustee Co Ltd* [1964] Ch 497, [1964] 2 All ER 487, was decided on this ground.

6 *Re Hubbard's Will Trusts, Marston v Angier* [1963] Ch 275 at 285, 286, [1962] 2 All ER 917 at 922. One of the provisions in *Re Hubbard's Will Trusts, Marston v Angier* supra fell within this category: see *Re Hubbard's Will Trusts, Marston v Angier* supra at 289 and at 924. See also *Re Allan's Will Trusts, Curtis v Nalder* [1958] 1 All ER 401, [1958] 1 WLR 220; *Re Coleman, Public Trustee v Coleman* [1936] Ch 528, [1936] 2 All ER 225.

7 *Re Hubbard's Will Trusts, Marston v Angier* [1963] Ch 275 at 287, [1962] 2 All ER 917 at 923. See also *Re Canning's Will Trusts, Skues v Lyon* [1936] Ch 309; *Re Abbott, Peacock v Frigout* [1893] 1 Ch 54.

8 In *Brudenell v Elwes* (1801) 1 East 442 at 454 the reason given was that the subsequent limitation was made to depend on the limitations to persons incapable of taking under the rule, and was not to take effect until they were extinct. See also *Palmer v Holford* (1828) 4 Russ 403; *Re Abbott, Peacock v Frigout* [1893] 1 Ch 54 at 57 per Stirling J; *Re Mill's Declaration of Trust, Midland Bank Executor and Trustee Co Ltd v Mill* [1950] 2 All ER 292, CA. Cf *Re Canning's Will Trusts, Skues v Lyon* [1936] Ch 309; *Re Coleman, Public Trustee v Coleman* [1936] Ch 528, [1936] 2 All ER 225 (distinguishing *Re Abbott, Peacock v Frigout* supra); *Re Allan's Will Trusts, Curtis v Nalder* [1958] 1 All ER 401, [1958] 1 WLR 220. See also *Re Hubbard's Will Trusts, Marston v Angier* [1963] Ch 275, [1962] 2 All ER 917; *Re Robinson's Will Trusts, Public Trustee v Gotto* [1963] 1 All ER 777, [1963] 1 WLR 628; *Re Buckton's Settlement Trusts, Public Trustee v Midland Bank Executor and Trustee Co Ltd* [1964] Ch 497, [1964] 2 All ER 487 (following *Re Hubbard's Will Trusts, Marston v Angier* supra; not following *Re Robinson's Will Trusts, Public Trustee v Gotto* supra).

9 *Re Allan's Will Trusts, Curtis v Nalder* [1958] 1 All ER 401, [1958] 1 WLR 220; and see *Willson v Copley* [1870] WN 46 and PARA 1082 ante. In *Monypenny v Dering* (1852) 2 De GM & G 145 at 182, Lord St Leonards LC said 'Where there are gifts over which are void for perpetuity, and there is a subsequent and independent clause which is within the line of perpetuities, effect cannot be given to such a clause unless it will dovetail in, and accord with, previous limitations which are valid'. See also *Re Davey, Prisk v Mitchell* [1915] 1 Ch 837, CA; *Re Canning's Will Trusts, Skues v Lyon* [1936] Ch 309; *Re Mill's Declaration of Trust, Midland Bank Executor and Trustee Co Ltd v Mill* [1950] 2 All ER 292, CA; *Re Hubbard's Will Trusts, Marston v Angier* [1963] Ch 275 at 289, [1962] 2 All ER 917 at 924 (subsequent limitation valid as not dependent); cf *Re Buckton's Settlement Trusts, Public Trustee v Midland Bank Executor and Trustee Co Ltd* [1964] Ch 497, [1964] 2 All ER 487 (subsequent interest invalid as dependent). See also WILLS vol 50 (2005 Reissue) PARA 513 et seq.

10 *Re Allan's Will Trust, Curtis v Nalder* [1958] 1 All ER 401, [1958] 1 WLR 220 (following *Re Coleman, Public Trustee v Coleman* [1936] Ch 528, [1936] 2 All ER 225); *Re Hubbard's Will Trusts, Marston v Angier* [1963] Ch 275 at 289, 290, [1962] 2 All ER 917 at 924, 925.

11 See PARA 1107 post.

12 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

13 For the meaning of 'disposition' see PARA 1009 note 1 ante.

14 For the meaning of 'interest disposed of' see PARA 1009 note 1 ante.

15 As to the acceleration of subsequent interests see WILLS vol 50 (2005 Reissue) PARA 472.

16 Perpetuities and Accumulations Act 1964 s 6, which abrogates the so-called 'rule' that the vesting of an interest could not be accelerated if it followed a limitation void for remoteness: see Morris and Leach's Rule against Perpetuities (2nd Edn), 1964 Supplement 13, 14.

17 Ie under the Perpetuities and Accumulations Act 1964 s 3 (1)-(3): see PARA 1009 ante. Where there is series of limitations, the 'wait and see' rule is applied to each one in turn as it becomes established that the preceding one must fail.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(5) FAILURE OF A LIMITATION UNDER THE RULE/(ii) Void Restrictions on Valid Limitations/1089. Directions for settlement.

(ii) Void Restrictions on Valid Limitations

1089. Directions for settlement.

If there is a direction, not by way of executory trust, that property limited to any person is to be settled on him and his issue on trusts which fail for remoteness, the direction for settlement on the issue is inoperative and may be rejected so long as there is a good absolute gift to the person in the first instance¹; but, where there is no such absolute gift, the limitation fails². Where, however, the trusts arise under an instrument to which the Perpetuities and Accumulations Act 1964 applies³, the 'wait and see' rule⁴ may prevent them from failing for remoteness.

1 *Arnold v Congreve* (1830) 1 Russ & M 209; *Carver v Bowles* (1831) 2 Russ & M 301; *Ring v Hardwick* (1840) 2 Beav 352; *Harvey v Stracey* (1852) 1 Drew 73 at 140; *Stephens v Gadsden* (1855) 20 Beav 463; *Gerrard v Butler* (1855) 20 Beav 541; *Salmon v Salmon* (1860) 29 Beav 27; *Cooke v Cooke* (1887) 38 ChD 202; *Re Boyd, Nield v Boyd* (1890) 63 LT 92 (doubted in *Re Knight, Re Wynn, Midland Bank Executor and Trustee Co Ltd v Parker* [1957] Ch 441 at 454, [1957] 2 All ER 252 at 260, CA); *Hancock v Watson* [1902] AC 14 at 22, HL. See also *Re Leek, Baron Darwen v Leek* [1969] 1 Ch 563 at 580, [1968] 1 All ER 793 at 797, CA; *Re Macandrew's Will Trusts, Stephens v Barclays Bank Ltd* [1964] Ch 704, [1963] 2 All ER 919. In *Kampf v Jones* (1837) 2 Keen 756, where the first absolute gift was to a minor, and the fund was carried to her account with liberty to apply, with a view to confirmation in case, on attaining 21, it was found to be for her benefit. See also Lewis's Law of Perpetuity 534.

2 *Lassence v Tierney* (1849) 1 Mac & G 551. As to gifts to a class see PARA 1079 ante.

3 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

4 *Idem* s 3 (1)-(3): see PARA 1009 ante. As to the exclusion of class members to avoid remoteness see also s 4 (3), (4) and PARA 1075 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(i) Powers in general/1090. Objections to powers.

(6) APPLICATION OF THE RULE TO POWERS

(i) Powers in general

1090. Objections to powers.

With regard to powers¹, objections on the ground of remoteness may be made either to the creation of the power or to the mode of exercise of the power.

Objections to the validity of a power in its creation may be made on the grounds that the persons to exercise the power, or the time fixed by the terms of the power for its exercise² or for its coming into effect, or the objects of the power or the subject matter of the power, may possibly not be ascertained within the perpetuity period. Such an objection, if well founded, prevents the power from ever being effectively exercised.

To a disposition exercising a power validly created there may also be the objection that it has an effect not allowed by the rule. Such an objection is fatal to the particular disposition concerned.

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies³, the 'wait and see' rule⁴ is available in respect of both the creation and exercise of powers⁵.

1 As to powers generally see POWERS vol 36(2) (Reissue) para 201 et seq; and as to the distinction between a general power of appointment and a special power see PARA 1062 note 3 ante, 1091 post.

2 Cf *Re Jones, Midland Bank Executor and Trustee Co Ltd v League of Welldoers* [1950] 2 All ER 239.

3 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

4 See *ibid* s 3 (1)-(3) and PARA 1009 ante.

5 See further PARA 1091 et seq post.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(i) Powers in general/1091. Exceptions.

1091. Exceptions.

If a general power is in other respects validly created within the limits allowed by the rule against perpetuities, it is no objection to its validity that the objects of the power may not be ascertained within the perpetuity period, as the donee is in effect in the position of an absolute owner¹. Thus a power in a single² donee to appoint to any person, including himself, without the consent³ of any other person is treated as equivalent to an absolute vested interest in the subject matter to which the power applies, the perpetuity period in relation to the appointment running not from the date of the instrument conferring the power but from the date of the appointment⁴. A power of appointment or collateral power contained in a settlement may be validly limited to take effect on the failure of issue in tail, provided that it can be barred by a disentail⁵. Powers created by way of security⁶, and powers to raise money for payment of the debts of the creator of the power, are not invalid merely because the time within which they may be exercised is not limited⁷.

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies⁸, or to an instrument exercising a special power of appointment contained in an instrument taking effect on or after 16 July 1964⁹, for the purposes of the rule against perpetuities, a power of appointment¹⁰ is to be treated as a special power unless:

- 44 (1) in the instrument creating the power it is expressed to be exercisable by one person only¹¹; and
- 45 (2) at all times during its currency¹² when that person is of full age and capacity, it could be exercised by him so as immediately to transfer to himself the whole of the interest governed by the power without the consent¹³ of any other person or compliance with any other condition, not being a formal condition¹⁴ relating only to the mode of exercise of the power¹⁵.

1 See *Re Fane, Fane v Fane* [1913] 1 Ch 404 at 413, CA per Buckley LJ; *Re Earl of Coventry's Indentures, Smith v Earl of Coventry* [1974] Ch 77 at 89-92, [1973] 3 All ER 1 at 11-13; and see PARA 1096 post.

2 For the purposes of the rule against perpetuities, a joint general power is treated as a special power: see *Re Earl of Coventry's Indentures, Smith v Earl of Coventry* [1974] Ch 77 at 91, 93, [1973] 3 All ER 1 at 13, 15, applying *Re Fane, Fane v Fane* [1913] 1 Ch 404, CA; *Re Churston Settled Estates* [1954] Ch 334, [1954] 1 All ER 725. Cf (1955) 71 LQR 242.

3 A general power exercisable only with the consent of a third person is treated as a special power: see *Re Earl of Coventry's Indentures, Smith v Earl of Coventry* [1974] Ch 77 at 91, 93, [1973] 3 All ER 1 at 13, 15. See, however, *Re Earl of Coventry's Indentures, Smith v Earl of Coventry* *supra* at 93 and at 15, where Walton J suggests that, where a person whose consent is sought gives the donee a general authorisation to exercise the power without further reference to him in any way the donee wishes, the power becomes general until that consent is withdrawn.

4 *Re Earl of Coventry's Indentures, Smith v Earl of Coventry* [1974] Ch 77 at 89, 90, [1973] 3 All ER 1 at 12.

5 See PARAS 1049 note 2, 1051 ante.

6 As to mortgages see PARA 1006 ante and PARAS 1116, 1117 post.

7 See *Silk v Prime* (1766) 1 Bro CC 138n. As to trusts for payment of debts see PARA 1053 ante; and as to the explanation of the exception in favour of those trusts see PARA 1053 note 1 ante. For another explanation of the validity of powers to raise money for the payment of debts see Gray's Rule against Perpetuities (4th Edn) s 486.

8 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante. See also *The Rules against Perpetuities and Excessive Accumulations* (Law Com consultation paper no 133) p 26 n 122.

9 See the Perpetuities and Accumulations Act 1964 s 15 (5) and PARA 1009 note 2 ante.

10 For the meaning of 'power of appointment' see PARA 1009 note 1 ante. A discretionary trust falls to be treated as a special power within that definition: *ibid* s 15 (2).

11 *Ibid* s 7 (a).

12 For the purposes of the Perpetuities and Accumulations Act 1964, it seems that it will not be possible to transform a special power in the manner suggested by Walton J in *Re Earl of Coventry's Indentures, Smith v Earl of Coventry* [1974] Ch 77 at 93, [1973] 3 All ER 1 at 15: see note 3 *supra*.

13 See note 3 *supra*.

14 See PARA 1096 note 6 post.

15 Perpetuities and Accumulations Act 1964 s 7 (b).

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(ii) General Powers of Appointment/1092. Remoteness in donees.

(ii) General Powers of Appointment

1092. Remoteness in donees.

The donee of a general power of appointment¹ must be a person who, if existing at all, must be ascertained within the perpetuity period reckoned from the time of creation of the power².

Such a power conferred on persons living at the time of creation of the power³, or on the survivor of any number of such persons⁴, is valid. The donee may even be unborn at that time, so long as it is certain, as in the case of the child of a living person, that he will be in existence and ascertainable within the proper period, at all events where the power is equivalent to absolute ownership⁵, but, if the donee will not necessarily be in existence and ascertainable within the proper period, for example if he is the survivor of a class of persons not then in existence, the power is void⁶.

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies⁷, the 'wait and see' rule⁸ is applicable. Thus, it will be necessary to wait and see whether the donee does in fact come into existence within the perpetuity period; and, only when it becomes established that he cannot do so, will the power fail.

¹ As to the distinction between a general power of appointment and a special power see PARAS 1062 note 3, 1091 ante.

² *Re Hargreaves, Midgley v Tatley* (1889) 43 ChD 401, CA, followed in *Re Vaux, Nicholson v Vaux* [1939] Ch 465 at 472, [1938] 4 All ER 297 at 302, CA.

3 Sugden on Powers (8th Edn) 394; Lewis's Law of Perpetuity 483.

4 *Robinson v Hardcastle* (1786) 2 Bro CC 22 at 30 per Lord Thurlow LC (special power), adopted in *Thellusson v Woodford* (1805) 11 Ves 112 at 145, HL per Lord Eldon LC.

5 *Bray v Hammersley* (1830) 3 Sim 513 (affd sub nom *Bray v Bree* (1834) 2 Cl & Fin 453, HL); and see *Re Earl of Coventry's Indentures, Smith v Earl of Coventry* [1974] Ch 77 at 89, 90, [1973] 3 All ER 1 at 12.

6 *Re Hargreaves, Midgley v Tatley* (1889) 43 ChD 401, CA (where the donee was the survivor of two living persons and all their children, and accordingly not necessarily ascertainable within the period allowed).

7 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

8 See ibid s 3 (2), (3) and PARA 1009 ante. The 80-year period under s 1 (see PARA 1010 ante) may be specified in relation to general powers: cf s 1 (2) and PARA 1010 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(ii) General Powers of Appointment/1093. Severable powers.

1093. Severable powers.

A power given to a series of persons may be severable¹. For example, if it is given to a named person and others filling, with him, a certain position, as that of trustee, it will be validly exercised by the named person², or, if given to a living person, his heirs or assigns, it can at all events be exercised by the living person³.

1 *Re Abbott, Peacock v Frigout* [1893] 1 Ch 54 at 60. As to a non-exclusive power severable among the objects see *Bell v Bell* (1862) 13 I Ch R 517, Ir CA.

2 *Attenborough v Attenborough* (1855) 1 K & J 296 (discretionary power given by a testator to 'my brother J and other my trustees'); and see *Re De Sommers, Coelenbier v De Sommers* [1912] 2 Ch 622; cf *Innes (Inspector of Taxes) v Harrison* [1954] 1 All ER 884, [1954] 1 WLR 668 (trustees defined in settlement as meaning first trustees and trustees for time being of the deed; single indivisible trust); *Re Watson's Settlement Trusts, Dawson v Reid* [1959] 2 All ER 676 at 681, [1959] 1 WLR 732 at 739 (indivisible power exercisable by trustees for the time being); and see POWERS vol 36(2) (Reissue) PARAS 228, 261.

3 *Earl of Bandon v Moreland* [1910] 1 IR 220. In *Grange v Tiving* (1665) O Bridg 107, a settlement contained a power of revocation reserved to the settlor and the heirs of his body, and it was held that his daughter could exercise the power after his death. The question of perpetuity was not discussed (the case was before *Duke of Norfolk's Case, Howard v Duke of Norfolk* (1683) 3 Cas in Ch 1), and the opinion has been expressed (Gray's Rule against Perpetuities (4th Edn) s 475 note (1)) that the case is not good law. See also Sugden on Powers (8th Edn) 152; Marsden's Rule against Perpetuities 241; *Earl of Bandon v Moreland* supra at 229.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(ii) General Powers of Appointment/1094. Remoteness in contingency on which power exercisable.

1094. Remoteness in contingency on which power exercisable.

The contingency on which the power is to become exercisable must be within the perpetuity period¹.

A general power of appointment conferred on an unborn person who must necessarily be in existence within the proper period, for example the child of a living person, is, when exercisable by deed or will, but not when exercisable by will only, equivalent to absolute ownership², and is not invalid³ except in cases where other restrictions, such as a necessary consent of trustees, introduce an element of uncertainty which may not necessarily be resolved within the proper period⁴.

A power exercisable only by the will of a person unborn at the creation of the power is invalid, as it ties up the property until the death of that person, and, therefore, beyond the perpetuity period⁵. If, however, the donee was alive at the creation of the power, there can be no objection on the ground of perpetuity⁶.

General powers of appointment under instruments to which the Perpetuities and Accumulations Act 1964 applies⁷ are not subject to the rule until it becomes established that they will not be exercisable within the period⁸.

1 *Blight v Hartnoll* (1881) 19 ChD 294 (where the power was not exercisable until after a sale of the property). For comment on this case see Gray's Rule against Perpetuities (4th Edn) s 476 note (2); Jarman on Wills (8th Edn) 320; Morris and Leach's Rule against Perpetuities (2nd Edn) 143 note 43; and PARA 1098 note 2 post. See also *Re Watson's Settlement Trusts*, *Dawson v Reid* [1959] 2 All ER 676, [1959] 1 WLR 732 (power of revocation); and see *Re Jones, Midland Bank Executor and Trustee Co Ltd v League of Welldoers* [1950] 2 All ER 239.

2 See PARA 1096 note 9 post.

3 *Bray v Hammersley* (1830) 3 Sim 513; affd without reported argument on this point sub nom *Bray v Bree* (1834) 2 Cl & Fin 453, HL, and followed in *Fry v Capper* (1853) Kay 163. The matter was assumed without argument in *Re Teague's Settlement* (1870) LR 10 Eq 564; *Re Meredith's Trusts* (1876) 3 ChD 757; and see *Jebb v Tugwell* (1855) 7 De GM & G 663. In *Re Hargreaves, Midgley v Tatley* (1889) 43 ChD 401, CA, the power was exercisable by deed or will, but the possibly unborn person, the donee of the power, might not be ascertained within the period.

4 *Webb v Sadler* (1873) 8 Ch App 419.

5 *Wollaston v King* (1869) LR 8 Eq 165; *Cooke v Cooke* (1887) 38 ChD 202; *Whitby v Mitchell* (1889) 42 ChD 494 (the point was not argued on appeal (1890) 44 ChD 85, CA); and see *Hutchinson v Tottenham* [1898] 1 IR 403 (affd [1899] 1 IR 344, Ir CA); *Tredennick v Tredennick* [1900] 1 IR 354.

6 *Phipson v Turner* (1838) 9 Sim 227; *Morse v Martin* (1890) 34 Beav 500; *Slark v Dakyns* (1874) 10 Ch App 35. In all these cases a special power was executed by an appointment in favour of a child, alive at the creation of the power, for life, and after his death as he should by will appoint.

7 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

8 See *ibid* s 3 (2), (3) and PARA 1009 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(ii) General Powers of Appointment/1095. Remoteness in contingency on which power takes effect.

1095. Remoteness in contingency on which power takes effect.

The contingency on which the appointment is to take effect must also be confined within the perpetuity period. In so far as the contingency is prescribed by the creator of the power, the period is calculated from the time of creation of the power¹.

Accordingly, the usual general power in a marriage settlement given to the wife, or in a will given to a woman unmarried at the testator's death, to appoint generally, in default of her

future issue taking vested interests under previous gifts, is valid²; but, except where saved by statute³, the power is not valid where the children are to take vested interests at an age greater than 21⁴.

A power for an unborn person to appoint so that the appointment takes effect on his death is invalid⁵, as is a power to appoint in such a way that the appointment takes effect on his marriage, for in such a case marriage is as uncertain as death with regard to the time when it may take place⁶.

In relation to general powers created or exercised and special powers created on or after 16 July 1964⁷, the application of the 'wait and see' rule⁸ may validate the power so that, until it becomes established that the contingency must occur, if at all, outside the period, the power is to be treated as valid.

1 *Re Norton, Norton v Norton* [1911] 2 Ch 27. Thus, in *Bristow v Boothby* (1826) 2 Sim & St 465 (affd (1829) by Lord Lyndhurst LC; see *Ellicombe v Gompertz* (1837) 3 My & Cr 127 at 151), after limitations in tail which did not exhaust all the issue, a general power of appointment was given to a living person on general failure of issue, and it was held void because conditioned to take effect on an event too remote; and see *Eno v Eno* (1847) 6 Hare 171. Thus, it appears that a power may be invalid although given to a living person, and therefore exercisable only during his life; but see Jarman on Wills (8th Edn) 320; and see (1914) 30 LQR 66 at 73, 74, where *Bristow v Boothby* supra is criticised.

2 It must be known within 21 years from the death of the donee of the power whether the children take under the gift to them at 21.

3 See the Law of Property Act 1925 s 163 (repealed in relation to instruments taking effect on or after 16 July 1964: see PARAS 1009 note 2, 1070 ante) and the Perpetuities and Accumulations Act 1964 s 4 (1), (2) (see PARA 1070 ante).

4 *Trustees, Executors and Agency Co Ltd v Jenner* (1897) 22 VLR 584; *Re O'Brien's Estate, Prytz v Trustees, Executors and Agency Co Ltd* (1898) 24 VLR 360.

5 See PARA 1094 ante.

6 *Morgan v Gronow* (1873) LR 16 Eq 1 at 10; cf *Re Finch and Chew's Contract* [1903] 2 Ch 486.

7 I.e. the commencement date of the Perpetuities and Accumulations Act 1964: see s 15 (5).

8 See *ibid* s 3 (1)-(3) and PARA 1009 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(ii) General Powers of Appointment/1096. Remoteness in the appointees.

1096. Remoteness in the appointees.

As regards the validity in its creation of a general power¹, the question whether the objects of the power can be ascertained within the perpetuity period or not does not arise². The freedom of disposition and choice of alienee possessed by the donee is the same as if he were absolute owner³. Therefore, in the case of a general power, if the power is well created, the perpetuity period for the purpose of exercise of the power must be calculated not from the time of creation of the power but from the time of its exercise⁴. This holds good even though the power is made exercisable by will only⁵, or with any other formalities of execution⁶.

The Perpetuities and Accumulations Act 1964 now provides that, for the purpose of determining whether a disposition⁷ made under a power of appointment exercisable by will⁸ only is void for remoteness, the power is to be treated as a general power where it would have fallen to be so treated if exercisable by deed⁹.

1 As to the distinction between a general power of appointment and a special power see PARAS 1062 note 3, 1091 ante.

2 As to special powers see PARAS 1097-1109 post.

3 See *Re Fane, Fane v Fane* [1913] 1 Ch 404 at 413, CA; and see *Re Earl of Coventry's Indentures, Smith v Earl of Coventry* [1974] Ch 77 at 89, 90, 91, 92, [1973] 3 All ER 1 at 12, 13; Lewis's Law of Perpetuity 483; Sugden on Powers (8th Edn) 394; Gray's Rule against Perpetuities (4th Edn) s 524. The view that a general power was equivalent to absolute ownership only where the donee had the absolute interest in default of appointment is not now accepted: see *Rous v Jackson* (1885) 29 ChD 521 at 526.

4 See the cases cited in PARA 1062 note 1 ante; Co Litt 272a, Butler's note; *Jee v Audley* (1787) 1 Cox Eq Cas 324 (a case of a limitation in exercise of a power; and see *Routledge v Dorril* (1794) 2 Ves 357 at 365); *Taylor v Frobisher* (1852) 5 De G & Sm 191 (another case of exercise of a general power by will).

5 *Rous v Jackson* (1885) 29 ChD 521; *Re Flower, Edmonds v Edmonds* (1885) 55 LJ Ch 200; *Stuart v Babington* (1891) 27 LR Ir 551. None of these cases followed *Re Powell's Trusts* (1869) 39 LJ Ch 188 (which case is, however, considered by Gray's Rule against Perpetuities (4th Edn) s 526 et seq as the soundest authority to the contrary; and see Morris and Leach's Rule against Perpetuities (2nd Edn) 147-149); and see PARA 1094 ante and the text and notes 7-9 infra.

6 *Rous v Jackson* (1885) 29 ChD 521. The formalities required must only relate to execution, otherwise they would amount to an independent restriction, as in *Webb v Sadler* (1873) 8 Ch App 419 (trustees' consent required); and see *Re Churston Settled Estates* [1954] Ch 334, [1954] 1 All ER 725; *Re Earl of Coventry's Indentures, Smith v Earl of Coventry* [1974] Ch 77 at 92, [1973] 3 All ER 1 at 14, where this note was cited with approval; and POWERS vol 36(2) (Reissue) PARA 206.

7 For the meaning of 'disposition' see PARA 1009 note 1 ante.

8 For the meaning of 'will' see PARA 1018 note 1 ante.

9 Perpetuities and Accumulations Act 1964 s 7 proviso; and see PARA 1062 ante. This preserves the rule as expounded in *Rous v Jackson* (1885) 29 Ch 521, with regard to the validity of the appointment. It does not, however, affect the position with regard to the validity of the power itself, which continues to be treated as special for this purpose.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(iii) Special Powers of Appointment/1097. In general.

(iii) Special Powers of Appointment

1097. In general.

Special powers of appointment¹, as regards their creation, are subject to the propositions previously stated as applicable to general powers of appointment with respect to the ascertainment during the perpetuity period of:

- 46 (1) the donees who are to exercise them;
- 47 (2) the time at which they are to be exercised; and
- 48 (3) the time at which they are to take effect².

For special powers the perpetuity period is always calculated from the time of the creation of the power³.

The provisions of the Perpetuities and Accumulations Act 1964 relating to the construction of references to a special power of appointment in instruments to which that Act applies⁴ have already been mentioned⁵.

1 As to the distinction between a general power of appointment and a special power see PARAS 1062 note 3, 1091 ante.

2 See PARAS 1092, 1094, 1095 ante. As to remoteness in the donee see *Re Hargreaves, Midgley v Tatley* (1889) 43 ChD 401, CA; as to remoteness in the time of exercise see *Wollaston v King* (1869) LR 8 Eq 165; and as to remoteness in the contingency on which appointments under the power are to take effect see *Re Norton, Norton v Norton* [1911] 2 Ch 27.

3 See PARA 1100 post. A power of advancement is analogous to a special power of appointment: see PARA 1064 ante.

4 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

5 See *ibid* s 7 and PARAS 1091, 1096 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(iii) Special Powers of Appointment/1098. Remoteness in objects.

1098. Remoteness in objects.

Special powers are subject to further restrictions. These are due to the fact that the class of objects in favour of whom the power may be executed is limited by the creator of the power. If this class is to be ascertainable on a contingency, the contingency must be one which must necessarily occur within the perpetuity period, reckoning from the date of the creation of the power¹. The power is void if the contingency upon which the class of objects is to be ascertained may be beyond the perpetuity period, even if the class forms part of a larger class every member of which must be ascertained within the perpetuity period. The rule requires the ascertainment not only of the extreme limits of the class of persons who may take, but of the very persons who are to take².

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies³, however, the 'wait and see' rule operates, so that the power will not fail if the class in fact becomes ascertainable within the perpetuity period⁴.

1 Eg persons living at a certain time or surviving a certain person: *Blight v Hartnoll* (1881) 19 ChD 294 (at time of sale); *Re Norton, Norton v Norton* [1911] 2 Ch 27; and see *Re Bowles, Page v Page* [1905] 1 Ch 371; *Re Staveley, Dyke v Staveley* (1920) 90 LJ Ch 111.

2 *Blight v Hartnoll* (1881) 19 ChD 294 at 300 per Fry J. The statement in *Blight v Hartnoll* supra at 301 that, apart from the effect of the rule against perpetuities, a power of appointment cannot be exercised amongst a class of persons who are not ascertained at the time of exercise has been criticised in Farwell on Powers (3rd Edn) 168, 169, and the criticism was approved in *Re Gestetner Settlement, Barnett v Blumka* [1953] Ch 672 at 687, [1953] 1 All ER 1150 at 1155, on the ground that the statement is too broad; and see *McPhail v Doulton* [1971] AC 424 at 453, HL. For further comment on *Blight v Hartnoll* supra see Gray's Rule against Perpetuities (4th Edn) s 476 note (2); Jarman on Wills (8th Edn) 320. On the question of uncertainty of objects see also *Wishaw v Stephens* [1970] AC 508, [1968] 3 All ER 785, HL, overruling *Re Gresham's Settlement, Lloyds Bank Ltd v Gresham* [1956] 2 All ER 193, [1956] 1 WLR 573, and applying *Re Gestetner Settlement, Barnett v Blumka* supra; and see *McPhail v Doulton* supra at 456, where it was held (Lord Hodson and Lord Guest dissenting) that the validity test for trusts was to be assimilated to that applicable to powers, namely that the trust is valid if it can be said with certainty that any given individual is or is not a member of the class.

3 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

4 See *ibid* s 3 (1), (3) and PARA 1009 ante. As to the exclusion of class members to avoid remoteness see s 4 (3), (4) and PARA 1075 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(iii) Special Powers of Appointment/1099. Class comprising valid and invalid objects.

1099. Class comprising valid and invalid objects.

Where the class of objects is defined by such a description that, if any of the class exist at all, some, at all events, of the class must necessarily be ascertained within the proper period, although the whole class may not be, as in the case of a power to appoint to issue generally of a living person, then the power is valid, even if within its terms an appointment may be made which is too remote. In such a case the only question that can arise will be as to how in fact the power has been exercised¹. Therefore, in creating such a power it is not necessary to insert words limiting the objects to persons born within a particular time, or otherwise taking vested interests within the proper period²; the insertion of such a restriction has no influence in rendering valid an appointment, even so far as the appointees are within the restriction³.

1 *Griffith v Pownall* (1843) 13 Sim 393 at 396; *Slark v Dakyns* (1874) 10 Ch App 35; *Re Warren's Trusts* (1884) 26 ChD 208; and see *Routledge v Dorril* (1794) 2 Ves 357; *Davy v Clarke* [1920] 1 IR 137; Lewis's Law of Perpetuity 487. As to *Thomas v Thomas* (1844) 14 Sim 234, which is apparently to the contrary, see Lewis's Law of Perpetuity, Supplement 166.

2 Lewis's Law of Perpetuity 487; Sugden on Powers (8th Edn) 397; Gray's Rule against Perpetuities (4th Edn) s 510. It is a desirable practice to refer to the rule by way of reminder to the parties. Such a reference appears preferable to a restriction to the life of the donee and 21 years after.

3 *Kampf v Jones* (1837) 2 Keen 756 at 761 per Lord Langdale MR; *Whitby v Mitchell* (1889) 42 ChD 494 at 500, 501 per Kay J (on appeal (1890) 44 ChD 85, CA); *Hutchinson v Tottenham* [1898] 1 IR 403 (affd [1899] 1 IR 344, Ir CA); and see *Re Paul, Public Trustee v Pearce* [1921] 2 Ch 1; *Re Lowry, Northern Bank Executor and Trustee Co Ltd v Stone* [1978] NI 17 at 23, 24. A suggestion was made in 1 Jarman on Wills (1st Edn) 250, and repeated in Lewis's Law of Perpetuity 498, that an appointment among the whole class without the restriction would be good to that extent, but Lewis's Law of Perpetuity 499 and Gray's Rule against Perpetuities (4th Edn) s 538 point out insuperable difficulties in adopting this suggestion, which has not been supported by subsequent editors of Jarman on Wills, nor by any decisions of a court. As to *Stroud v Norman* (1854) Kay 313 see Gray's Rule against Perpetuities (4th Edn) s 540.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(iii) Special Powers of Appointment/1100. Remoteness in appointees.

1100. Remoteness in appointees.

The exercise of a special power of appointment takes effect as a selection among the objects¹, and as a delegated disposition by the creator of the power. Therefore, by exercising the power, the donee may not create estates or interests which the creator of the power could not himself in like circumstances have created by some other disposition, instead of creating the power². In other words, while the circumstances in which the appointment is made are considered and taken into account, the perpetuity period is reckoned from the time of creation of the power, that is to say, from the testator's death in the case of a power created by will or the date of the

non-testamentary instrument creating the power, and is not reckoned from the time of exercise, as in the case of a general power³.

In respect of powers under instruments to which the Perpetuities and Accumulations Act 1964 applies⁴, the 'wait and see' rule will be available⁵. The power will be validly exercised if, in the events which happen, it is exercised in favour of a person taking within the perpetuity period calculated by reference to the lives in being available under that Act who have been previously specified⁶.

1 Co Litt 272a, s 463 para VII 2, Butler's note.

2 Lewis's Law of Perpetuity 488; *Duke of Marlborough v Earl Godolphin* (1759) 1 Eden 404 at 417 (affd sub nom *Lord Spencer v Duke of Marlborough* (1763) 3 Bro Parl Cas 232); *Whitting v Whitting* (1908) 53 Sol Jo 100.

3 *Robinson v Hardcastle* (1786) 2 Bro CC 22 (subsequent proceedings (1788) 2 Term Rep 241, 380, 781); *Routledge v Dorril* (1794) 2 Ves 357 at 366; *Massey v Barton* (1844) 7 I Eq R 95 (commented upon, as to the application of the rule to the facts, in *Re Hallinan's Trusts* [1904] 1 IR 452 at 456, 458, Ir CA per Porter MR); *Chance v Chance* (1853) 16 Beav 572; *Slark v Dakyns* (1874) 10 Ch App 35 at 42; *Re Coulman, Munby v Ross* (1885) 30 ChD 186 at 188; *Cooke v Cooke* (1887) 38 ChD 202 at 210; *Re Boyd, Nield v Boyd* (1890) 63 LT 92 at 94; *Tredennick v Tredennick* [1900] 1 IR 354; *Re Thompson, Thompson v Thompson* [1906] 2 Ch 199 at 202; *Whitby v Von Luedecke* [1906] 1 Ch 783 at 789 (followed in *Re Legh's Settlement Trusts, Public Trustee v Legh* [1938] Ch 39, [1937] 3 All ER 823, CA: see comments in the Fourth Report of the Law Reform Committee (1956) (Cmd 18) PARA 29); *Re Manning's Trusts* (1915) 49 ILT 143 (cited in PARA 1067 note 8 ante); *Re Ramadge's Settlement, Hamilton v Ramadge* [1919] 1 IR 205; *Re Samuda's Settlement Trusts, Horne v Courtenay* [1924] 1 Ch 61; *Re Johnson's Settlement Trusts, McClure v Johnson* [1943] Ch 341, [1943] 2 All ER 499; *Re Churston Settled Estates* [1954] Ch 334, [1954] 1 All ER 725; *Re Earl of Coventry's Indentures, Smith v Earl of Coventry* [1974] Ch 77, [1973] 3 All ER 1; *Fitzwilliam v IRC* [1993] 3 All ER 184 at 199; sub nom *IRC v Fitzwilliam, IRC v Hastings* [1993] 1 WLR 1189 at 1204, 1205, HL per Lord Keith of Kinkel. See also *Re Crichton's Settlement, Sweetman v Batty* (1912) 106 LT 588; Sugden on Powers (8th Edn) 396; Gray's Rule against Perpetuities (4th Edn) s 515; and see Co Litt 272a, s 463 para VII 2.

4 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante. The 1964 Act applies to instruments made in the exercise of a special power of appointment only if the instrument creating the power took effect on or after 16 July 1964: see s 15 (5) (cited in PARA 1009 note 2 ante).

5 See *ibid* s 3 (1), (3) and PARA 1009 ante.

6 *le* available under *ibid* s 3 (4), (5): see PARA 1011 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(iii) Special Powers of Appointment/1101. Test for appointments.

1101. Test for appointments.

An appointment is conveniently tested by placing the estates and interests, created by the appointment, in the instrument creating the power in the place of the power itself, as if the instrument creating the power and the instrument executing the power had been incorporated in one instrument¹. In adopting this test the language of the appointment should neither be written literally into the instrument creating the power, for in that case contradictions of time would be introduced², nor be translated into the language which the creator of the power would have used at the time of creation to describe the appointees or to fix the times of vesting of their interests³. The appointment should be read into the prior instrument with reference to all its attendant circumstances at the time when the appointment took effect⁴. It is as if the creator had left a blank in the limitations or succession of interests in the instrument creating the power and had himself, at the date and in the circumstances existing when the appointment took effect, filled up that blank.

An appointment by will is ambulatory until the testator's death, and the appointment may be valid at his death although it would have been invalid at the date of the will⁵.

A special power may be exercised in such a way as to create a completely new settlement superseding the original settlement so that limitations run from the date of the new settlement⁶.

1 *Duke of Marlborough v Lord Godolphin* (1750) 2 Ves Sen 61 at 78; *Harvey v Stracey* (1852) 1 Drew 73 at 134; *D'Abbadie v Bizoin* (1871) 11 IR 5 Eq 205; *Re Brown and Sibly's Contract* (1876) 3 ChD 156; *Re Thompson, Thompson v Thompson* [1906] 2 Ch 199. See also *Muir (or Williams) v Muir* [1943] AC 468 at 484, HL; *Hart (Inspector of Taxes) v Briscoe* [1979] Ch 1 at 6-8, [1978] 1 All ER 791 at 805-807; *Perpetual Trustee Co Ltd v Stamp Duties Comr* [1977] AC 525 at 534, [1976] 2 All ER 792 at 795, PC; *Jamieson v IRC* [1962] Ch 748 at 781, [1962] 2 All ER 321 at 333, CA (revsd on other grounds [1964] AC 1445, [1963] 2 All ER 1030, HL); *Re Abrahams' Will Trusts, Caplan v Abrahams* [1969] 1 Ch 463, [1967] 2 All ER 1175, distinguishing *Re Vaux, Nicholson v Vaux* [1939] Ch 465, [1938] 4 All ER 297, CA. The instrument by which the power is exercised is not, however, back-dated to the date of the original instrument for revenue purposes: *Perpetual Trustee Co Ltd v Stamp Duties Comr* supra at 534 and at 795.

2 *Re Thompson, Thompson v Thompson* [1906] 2 Ch 199 at 205 per Joyce J.

3 *Re Hallinan's Trusts* [1904] 1 IR 452, 1r CA; Gray's Rule against Perpetuities (4th Edn) ss 517-519.1, criticising the contrary view in Lewis's Law of Perpetuity 491, 492.

4 See PARA 1063 ante; and see Morris and Leach's Rule against Perpetuities (2nd Edn) 152-154.

5 *Re Thompson, Thompson v Thompson* [1906] 2 Ch 199. Cf *Re Fane, Fane v Fane* [1913] 1 Ch 404, CA (no objection on the ground of remoteness at the time when the words to be written into the will were ascertained).

6 *Hart (Inspector of Taxes) v Briscoe* [1979] Ch 1, [1978] 1 All ER 791; *Pilkington v IRC* [1964] AC 612 at 641, 642, [1962] 3 All ER 622 at 631, 632, HL (powers of advancement); cf *Re Abrahams' Will Trusts, Caplan v Abrahams* [1969] 1 Ch 463 at 485, 486, [1967] 2 All ER 1175 at 1191, 1192.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(iii) Special Powers of Appointment/1102. Appointment for life with special power by will.

1102. Appointment for life with special power by will.

A special power may be exercised in favour of an object of the power by giving him a life interest and a general power of appointment by will only, if he is alive at the creation of the power¹, but not if he is unborn at the creation of the power².

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies³, the 'wait and see' rule⁴ will apply and the appointment will be valid if in fact exercised in favour of a person taking within the perpetuity period⁵.

1 *Phipson v Turner* (1838) 9 Sim 227; *Morse v Martin* (1865) 34 Beav 500; *Slark v Dakyns* (1874) 10 Ch App 35.

2 *Wollaston v King* (1869) LR 8 Eq 165; *Whitby v Mitchell* (1889) 42 ChD 494 (affd (1890) 44 ChD 85, CA); *Tredennick v Tredennick* [1900] 1 IR 354; and see *Cooke v Cooke* (1887) 38 ChD 202.

3 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

4 See *ibid* s 3 (1), (3) and PARA 1009 ante.

5 See further PARA 1100 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(iii) Special Powers of Appointment/1103. Appointment to next of kin.

1103. Appointment to next of kin.

An appointment after the deaths of any objects of the power to their next of kin is valid in the case of an object alive at the creation of the power, subject to the question whether the next of kin are objects of the power, but is invalid under the rule against perpetuities in the case of an object unborn at the creation of the power¹.

In relation to special powers under instruments to which the Perpetuities and Accumulations Act 1964 applies², the 'wait and see' rule³ will be available to save appointments. The appointment will be validly made if, in the events which happen, the interest vests within the perpetuity period⁴.

1 *Re Coulman, Munby v Ross* (1885) 30 ChD 186; and see Morris and Leach's Rule against Perpetuities (2nd Edn) 154. As to appointments to executors and administrators of an unborn person see *Webb v Sadler* (1873) 8 Ch App 419 at 427, 428.

2 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARAS 1009 note 2, 1100 note 4 ante.

3 See *ibid* s 3 (1), (3) and PARA 1009 ante.

4 I.e. calculated by reference to the statutory lives under *ibid* s 3 (4), (5): see PARA 1011 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(iii) Special Powers of Appointment/1104. Invalid appointment with concurrence.

1104. Invalid appointment with concurrence.

Where an appointment is made which is invalid wholly or partially under the rule against perpetuities, and in the same instrument of appointment a person concurs¹ as a party to the deed or otherwise to whom a perfectly valid appointment might have been made of the property appointed, then, if the facts warrant it, and if there is no question of a fraud on the power², the appointment may be treated as an appointment to that person absolutely, with a subsequent settlement or disposition by him in favour of the actual appointees³. That treatment depends, however, upon attributing to the parties the intention of effecting such a result; if it is clear that the result involves a complete remoulding of the transaction into a form never considered by the parties, the appointment will fail⁴. The acts of concurrence must be such as to make the disposition binding on the object concurring⁵.

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies⁶, the initial appointment may be saved by the application of the 'wait and see' rule⁷.

1 It must be a conscious concurrence: see *Re Earl of Coventry's Indentures, Smith v Earl of Coventry* [1974] Ch 77 at 94, [1973] 3 All ER 1 at 16, and the cases there cited; and see the text and note 5 *infra*.

2 See *Birley v Birley* (1858) 25 Beav 299 and POWERS vol 36(2) (Reissue) PARA 364 et seq.

3 *Routledge v Dorril* (1794) 2 Ves 357 at 362; *Whitting v Whitting* (1908) 53 Sol Jo 100; and see *Morgan v Gronow* (1873) LR 16 Eq 1 at 10 (where the ground of invalidity of one daughter's appointment was said to be that she did not concur in the appointment, and therefore there was no settlement on her issue other than by the exercise of the power); Gray's Rule against Perpetuities (4th Edn) ss 528, 529; Morris and Leach's Rule against Perpetuities (2nd Edn) 150.

4 See *Re Earl of Coventry's Indentures, Smith v Earl of Coventry* [1974] Ch 77 at 95, [1973] 3 All ER 1 at 17 (where the argument failed).

5 See *Brudenell v Elwes* (1802) 7 Ves 382 at 390.

6 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARAS 1009 note 2, 1100 note 4 ante.

7 See *ibid* s 3 (1), (3) PARAS 1009, 1100 et seq ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(iii) Special Powers of Appointment/1105. Rejection of restrictions.

1105. Rejection of restrictions.

The principles relating to rejecting separable invalid restrictions on validly created interests¹, and other rules as to direct limitations, apply to appointments under powers².

1 See PARA 1089 ante.

2 Thus, invalid directions for settlement were rejected in appointments in *Carver v Bowles* (1831) 2 Russ & M 301 at 304; *Harvey v Stracey* (1852) 1 Drew 73 at 140; *Stephens v Gadsden* (1855) 20 Beav 463; *Gerrard v Butler* (1855) 20 Beav 541; *Cooke v Cooke* (1887) 38 ChD 202; *Re Boyd, Nield v Boyd* (1890) 63 LT 92 (doubted in *Re Knight, Re Wynn, Midland Bank Executor and Trustee Co Ltd v Parker* [1957] Ch 441 at 454, [1957] 2 All ER 252 at 260, CA); *Re Oliphant's Trusts, Re Dixon's Will, Phillips v Phelps* (1916) 86 LJ Ch 452; *Re Staveley, Dyke v Staveley* (1920) 90 LJ Ch 111; and see *Griffith v Pownall* (1843) 13 Sim 393. The appointee's marriage was not an adoption of the trusts of the appointed fund, so as to establish the validity of a restraint clause: *Re Teague's Settlement* (1870) LR 10 Eq 564 at 569.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(iii) Special Powers of Appointment/1106. Devolution of interest invalidly appointed.

1106. Devolution of interest invalidly appointed.

Subject to the rules permitting the separation of any part of an appointment capable of being separated, the rejection of invalid restrictions, a valid further appointment¹ or a valid confirmation², the whole of any interest which is invalidly appointed under the rule against perpetuities goes to the persons entitled in default of appointment³. Where it becomes established that an appointment which has been treated as valid only by virtue of the Perpetuities and Accumulations Act 1964 must take effect, if at all, outside the perpetuity period, the Act provides that its becoming so established is not to invalidate anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise⁴. Thus the rights of persons entitled in default of appointment take effect subject to such things previously done.

1 *Morgan v Gronow* (1873) LR 16 Eq 1; cf *Re Lees' Trusts*, *Lees v Lees* [1926] WN 220; and see *Wollaston v King* (1869) LR 8 Eq 165.

2 If circumstances afterwards make it possible, a void appointment may be confirmed by reappointment, but not by any mere expression of desire to confirm the invalid appointment: *Morgan v Gronow* (1873) LR 16 Eq 1 at 11.

3 *Routledge v Dorril* (1794) 2 Ves 357; *Chance v Chance* (1853) 16 Beav 572; *Ratcliffe v Hampson* (1855) 1 Jur NS 1104; *Wollaston v King* (1869) LR 8 Eq 165; *D'Abbadie v Bizoin* (1871) LR 5 Eq 205; *Whitby v Mitchell* (1889) 42 ChD 494 (affd (1890) 44 ChD 85, CA); *Re Boyd, Nield v Boyd* (1890) 63 LT 92. In *Re Heathcote, Trench v Heathcote* [1891] WN 10 and *Re Crichton's Settlement, Sweetman v Batty* (1912) 106 LT 588, the persons so entitled in default of appointment were ordered to bring certain validly appointed interests into hotchpot. See also *Re Earl of Coventry's Indentures, Smith v Earl of Coventry* [1974] Ch 77, [1973] 3 All ER 1. In the case of appointments by will under general powers, an interest invalidly appointed may pass under a residuary devise or bequest: see the Wills Act 1837 ss 25, 27 and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 531, 532; POWERS vol 36(2) (Reissue) PARA 310 et seq; WILLS vol 50 (2005 Reissue) PARAS 474-475. In the case of appointments under special powers, an interest invalidly appointed will not as a general rule pass under a residuary devise or bequest: *Holyland v Lewin* (1884) 26 ChD 266, CA (disapproving *Freme v Clement* (1881) 18 ChD 499); and see Morris and Leach's Rule against Perpetuities (2nd Edn) 155.

4 See the Perpetuities and Accumulations Act 1964 s 3 (1) (cited in PARA 1009 ante) and s 4 (5) (cited in PARAS 1070, 1075 ante); cf s 2 (2) (cited in PARA 1066 ante).

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(iii) Special Powers of Appointment/1107. Effect on gift in default.

1107. Effect on gift in default.

The fact that a power may be exercised in a manner contrary to the rule does not affect a gift in default of appointment, which takes effect unless it is itself obnoxious to the rule against perpetuities¹. This is so because, until the power is exercised, the property remains vested in those who take in default of appointment².

1 *Wollaston v King* (1869) LR 8 Eq 165; *Webb v Sadler* (1873) 8 Ch App 419; *Re Coulman, Munby v Ross* (1885) 30 ChD 186; *Re Abbott, Peacock v Frigout* [1893] 1 Ch 54; *Re Hobson's Estate, Hobson v Sharp* [1907] VLR 724; *Re Hay, Leech v Hay* [1932] NI 215.

2 See *Lambert v Thwaites* (1866) LR 2 Eq 151 at 155; *Re Arnold, Wainwright v Howlett* [1947] Ch 131, [1946] 2 All ER 579; and POWERS vol 36(2) (Reissue) PARA 283. Cf Morris and Leach's Rule against Perpetuities (2nd Edn) 159.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(iii) Special Powers of Appointment/1108. Effect on gift subject to exercise of power.

1108. Effect on gift subject to exercise of power.

A gift to take effect on the determination of prior interests, including interests to be appointed under a power, may take effect as an independent alternative gift. If the power is not exercised, or is exercised so as to render the subsequent gift unobjectionable under the rule, the gift takes effect; and, if it is exercised so as to make the subsequent gift objectionable under the rule, the gift will be void, so that until the exercise of the power it cannot be said whether the gift is good or bad¹. In relation to dispositions under instruments taking effect on or after 16 July 1964² it is now provided that the disposition is not to be treated as void for

remoteness by reason only of its being ulterior to and dependent upon an interest under a disposition which is so void, and the vesting of the disposition is not to be prevented from being accelerated on the failure of the prior interest by reason only that the prior interest fails for remoteness³.

1 *Re Bowles, Page v Page* [1905] 1 Ch 371, approved in *Re Davies and Kent's Contract* [1910] 2 Ch 35, CA. In these cases powers to appoint to husbands or wives, which might have been exercised in favour of persons who were not lives in being but were not so exercised, did not displace gifts to take effect on the determination of the trusts, including the trusts arising under the appointments, but this principle does not apply where the validity of the power itself is at stake: see *Re Watson's Settlement Trusts, Dawson v Reid* [1959] 2 All ER 676 at 681, [1959] 1 WLR 732 at 739 and PARA 1083 ante.

2 The commencement date of the Perpetuities and Accumulations Act 1964.

3 See *ibid* s 6 and PARAS 1082, 1088 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(iii) Special Powers of Appointment/1109. Election.

1109. Election.

Where a testator has a special power of appointment and exercises it in favour of objects not capable of taking under the rule, but at the same time disposes of his own property in favour of objects entitled in default of appointment, the persons so entitled are not bound to elect whether they will confirm the invalid disposition or take the interest in the testator's property¹. Where, however, the appointment does not infringe the rule, but is to persons not objects of the power, the persons entitled in default must so elect².

1 *Robinson v Hardcastle* (1788) 2 Bro CC 344; *Re Handcock's Trust* (1889) 23 LR Ir 34, Ir CA; and see EQUITY vol 16(2) (Reissue) PARA 728 text and note 4. See also Gray's Rule against Perpetuities (4th Edn) ss 541-561.7.

2 *Re Wheatley, Smith v Spence* (1884) 27 ChD 606 at 611; *Whistler v Webster* (1794) 2 Ves 367; *Pitman v Crum Ewing* [1911] AC 217 at 243, 244, HL (a Scottish case); and see Morris and Leach's Rule against Perpetuities (2nd Edn) 157, 158.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(iv) Collateral Powers/1110. Powers arising on contingency.

(iv) Collateral Powers

1110. Powers arising on contingency.

If a power of sale or other collateral power is created to arise on a future event, that event must be such as must necessarily happen within the perpetuity period¹.

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies², the 'wait and see' provisions³ will, however, be available, and the mere possibility that the event may occur outside the perpetuity period will not invalidate the power. Until it is established that it must happen, if at all, outside the perpetuity period, it must be treated as valid for the purposes of the rule against perpetuities³.

1 *Hale v Pew* (1858) 25 Beav 335; and see *Re Davies and Kent's Contract* [1910] 2 Ch 35, CA (trust for sale); *Blight v Hartnoll* (1881) 19 ChD 294; *Re Garnham, Taylor v Baker* [1916] 2 Ch 413; *Re Spitzel's Will Trusts, Spitzel v Spitzel* [1939] 2 All ER 266 (forfeiture clause); and PARA 1034 ante.

2 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

3 See *ibid* s 3 (1)-(3) and PARA 1009 ante. In so far as the power is administrative only, it will be outside the rule: see s 8 (1) and PARA 1034 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(iv) Collateral Powers/1111. Duration of powers.

1111. Duration of powers.

The duration of a power, whether created to arise immediately or on a future event, is a matter of construction of the instrument creating it¹. If, however, the power amounts to no more than an administrative direction to trustees, it is not within the rule against perpetuities². Where the power is made exercisable, expressly or impliedly, during the continuance of the beneficial trusts declared by the instrument, then, so long as these beneficial trusts are valid within the rule, the power is validly exercisable until the effect of the settlement is spent and the estates under it become vested in possession³.

1 *Re Cotton's Trustees and London School Board* (1882) 19 ChD 624 at 626 per Fry J; *Re Jump, Galloway v Hope* [1903] 1 Ch 129; cf *Re Wragg, Wragg v Palmer* [1919] 2 Ch 58.

2 *Re Morphey, Worthington v Church Comrs* (1957) 107 L Jo 299 (provision entitling trustees to refrain from calling in debt in certain circumstances; in this case the beneficiaries' interests were vested, and they could therefore determine the trustee's discretionary powers at any time; cf para 1052 ante, 1119 post); and see *Queen's University of Belfast v A-G for Northern Ireland* [1966] NI 115 at 117 (where it was held that a direction to pay (to trustees) an annual sum out of a fund held on perpetual trusts was valid). The Perpetuities and Accumulations Act 1964 s 8 (see PARA 1034 ante) provides that, in so far as the power is administrative only, it will be outside the rule, thus dealing with the problem illustrated by *Re Allott, Hanmer v Allott* [1924] 2 Ch 498, CA (cited in note 3 infra).

3 *Trower v Knightley* (1821) 6 Madd 134; *Boyce v Hanning* (1832) 2 Cr & J 334; *Wood v White* (1839) 4 My & Cr 460; *Lantsbery v Collier* (1856) 2 K & J 709; *Doncaster v Doncaster* (1856) 3 K & J 26; *Taite v Swinstead* (1859) 26 Beav 525; *Re Horsnail, Womersley v Horsnail* [1909] 1 Ch 631, approved in *Re Kipping, Kipping v Kipping* [1914] 1 Ch 62. In *Re Allott, Hanmer v Allott* [1924] 2 Ch 498, CA, the trusts exceeded the legal limit and, as the power of leasing given to the trustees was capable of being exercised when the perpetuity period had run out, the power was void. For comment on this case see the Fourth Report of the Law Reform Committee (1956) (Cmd 18) PARA 34. That problem was dealt with by the Perpetuities and Accumulations Act 1964 s 8 (see PARA 1034 ante), which provides that, in so far as the power is administrative only, it will be outside the rule (see the text and note 2 supra). The position is similar where a power is exercisable only with the consent of persons entitled under the beneficial limitations: Third Report of the Commissioners on the Law of Real Property (1832) 34; *Biddle v Perkins* (1829) 4 Sim 135; *Powis v Capron* (1830) 4 Sim 138n; *Re W and R Holmes and Cosmopolitan Press Ltd's Contract* [1944] Ch 53, [1943] 2 All ER 716.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(iv) Collateral Powers/1112. Continuance of trusts for sale.

1112. Continuance of trusts for sale.

Express or implied trusts for the sale of land are by statute deemed, in favour of a purchaser, to be subsisting until the land has been conveyed to or under the direction of the persons interested in the proceeds of sale, but without prejudice to any court order restraining a sale¹.

¹ Law of Property Act 1925 s 23, replacing the Conveyancing Act 1911 s 10 (3), (4) (repealed). See SETTLEMENTS vol 42 (Reissue) PARA 906.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(iv) Collateral Powers/1113. Powers framed in general terms.

1113. Powers framed in general terms.

Even if framed in general terms, powers are limited by the nature of the limitations contained in the instrument, so that, when absolute interests come into existence by reason of the expiration or cesser of those limitations, the power is usually considered to be at an end¹. This affords a guarantee against remoteness in such cases. This principle has no application, however, where the power is to take effect on the coming into existence of the absolute interests², whether for the purposes of division³ or other purposes connected with the instrument⁴. In these cases the power may be exercised validly within a reasonable time afterwards⁵.

¹ *Nelson v Callow* (1848) 15 Sim 353; *Peters v Lewes and East Grinstead Rly Co* (1881) 18 ChD 429, CA; cf *Meller v Stanley* (1864) 2 De GJ & Sm 183 (trust to renew lease indefinitely); *Re W and R Holmes and Cosmopolitan Press Ltd's Contract* [1944] Ch 53, [1943] 2 All ER 716. In *Re Brown's Settlement* (1870) LR 10 Eq 349 at 353, James V-C said that so long as there is a settled estate in any part of the property, so long must the power remain in existence; and see POWERS vol 36(2) (Reissue) PARA 383.

² *Peters v Lewes and East Grinstead Rly Co* (1881) 18 ChD 429, CA; *Re W and R Holmes and Cosmopolitan Press Ltd's Contract* [1944] Ch 53, [1943] 2 All ER 716.

³ *Re Cotton's Trustees and London School Board* (1882) 19 ChD 624; *Re Henzell, Holgate v Humphris* [1887] WN 240; *Re Lord Sudeley and Baines & Co* [1894] 1 Ch 334.

⁴ *Re Dyson and Fowke* [1896] 2 Ch 720.

⁵ See *Re Tweedie and Miles* (1884) 27 ChD 315 (a trust at discretion to sell, where the delay was held not unreasonable); *Re Lord Sudeley and Baines & Co* [1894] 1 Ch 334. In *Peters v Lewes and East Grinstead Rly Co* (1881) 18 ChD 429 at 434, CA, Jessel MR said that, where there is nothing but absolute limitations of interests given in the first instance, no one would say that 21 years was a reasonable time.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(iv) Collateral Powers/1114. Barrable powers.

1114. Barrable powers.

Powers which may be barred by a tenant in tail are not obnoxious to the rule against perpetuities during the continuance of the estate tail; but a power of management annexed to an unbarrable estate during minorities, and not confined within the perpetuity period, is invalid¹.

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies², a power is not to be treated as void merely because it might be exercised outside the perpetuity period³. In so far as the power is in fact exercised within the perpetuity period, it is to be treated as if it were not subject to the rule against perpetuities, and void only in so far as it is not exercised within that period³. Furthermore, a power to sell, lease, exchange or otherwise dispose of any property for full consideration, or to do any other act in the administration (as opposed to the distribution) of any property, is now effectively exempted from the rule against perpetuities⁴.

1 See PARA 1051 ante.

2 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

3 See *ibid* s 3 (2), (3) and PARA 1009 ante.

4 See *ibid* s 8 (1) and PARA 1034 ante. Section 8 (1) applies for the purpose of enabling a power to be exercised at any time before, on or after 16 July 1964 (the commencement date of the Act), notwithstanding that the power is conferred by an instrument which took effect before that date: s 8 (2).

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(6) APPLICATION OF THE RULE TO POWERS/(iv) Collateral Powers/1115. Powers to change nature of interests.

1115. Powers to change nature of interests.

No power can be given to change the nature of the interests limited by the instrument at a time exceeding the limit prescribed by the rule against perpetuities¹.

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies², such a power will, however, be void only in so far as it is not in fact exercised within the perpetuity period³.

1 *Ware v Polhill* (1805) 11 Ves 257; *Peters v Lewes and East Grinstead Rly Co* (1881) 18 ChD 429 at 433, CA per Jessel MR; *Tyrrell v Naylor* (1892) 11 NZLR 118. See also *Barralet v A-G* [1980] 3 All ER 918 at 921; sub nom *Re South Place Ethical Society, Barralet v A-G* [1980] 1 WLR 1565 at 1568, where Dillon J would have been prepared to hold void for perpetuity a power to change the objects of a charitable trust to non-charitable objects. See also *Re Hargreaves* [1973] Qd R 448.

2 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

3 See *ibid* s 3 (2), (3) and PARA 1009 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(7) GENERAL INAPPLICABILITY OF THE RULE TO SECURITIES/1116. Inapplicability of rule to mortgages.

(7) GENERAL INAPPLICABILITY OF THE RULE TO SECURITIES

1116. Inapplicability of rule to mortgages.

Where an estate or interest is invalidated by the rule against perpetuities, a mortgage, charge or other security upon that estate or interest is nugatory as a security. Where, however, an estate or interest is validly created, the rule has no application to the estates, interests or rights of an ordinary mortgagor and mortgagee, chargor and chargee, or persons deriving title under them in respect of the estate or interest so validly created, or to the exercise of the powers conferred by the security¹. A proviso for redemption at any time is not invalid under the rule².

1 See *Knightsbridge Estates Trust Ltd v Byrne* [1939] Ch 441, [1938] 4 All ER 618, CA; affd [1940] AC 613, [1940] 2 All ER 401, HL. As to rentcharges see PARA 1006 ante.

2 See *Hasker v Summers* (1884) 10 VLR Eq 204.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(7) GENERAL INAPPLICABILITY OF THE RULE TO SECURITIES/1117. Rights of mortgagor and mortgagee apart from the rule.

1117. Rights of mortgagor and mortgagee apart from the rule.

Apart from any application of the rule against perpetuities, any restriction in a mortgage purporting to limit a time after which the mortgagor may not redeem is inoperative against the mortgagor¹, who may redeem at any time, however remote, subject to the provisions of the enactments relating to the limitation of actions to redeem land². Where there is a provision postponing the right to redeem, provided that the right of redemption is real, it seems that the mere length of time of the postponement is not an objection to the transaction if there is nothing oppressive or unconscionable in the transaction³.

Collateral advantages given to the mortgagee are protected from objection on account of remoteness by the rule against clogging the equity of redemption⁴.

1 See MORTGAGE vol 77 (2010) PARAS 202, 311.

2 See LIMITATION PERIODS vol 68 (2008) PARA 1095 (effect of expiration of period of limitation), PARA 1131 (12-year period for bringing of action to redeem where mortgagee in possession), PARAS 1136, 1168 et seq (effect of mortgagor's disability), PARA 1182 et seq (effect of acknowledgment or receipt of payment by mortgagee). No period of limitation applies to an action to redeem mortgaged personalty: see LIMITATION PERIODS vol 68 (2008) PARA 1129.

3 See MORTGAGE vol 77 (2010) PARA 318.

4 See MORTGAGE vol 77 (2010) PARA 319.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/2. THE RULE AGAINST PERPETUITIES/(7) GENERAL INAPPLICABILITY OF THE RULE TO SECURITIES/1118. Company securities.

1118. Company securities.

A floating charge on a company's assets is treated as valid, although the events upon which it may crystallise may take place at any remote period¹.

By statute, debentures of a company under the Companies Act 1985 may be made irredeemable, or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long².

1 As to floating charges see COMPANIES vol 15 (2009) PARA 1269 et seq.

2 See the Companies Act 1985 s 193 (now repealed). The provision was originally introduced by the Companies Act 1907 s 14 (repealed), apparently in order to negative the decision in *Re Southern Brazilian Rio Grande do Sul Rly Co Ltd* [1905] 2 Ch 78, where, however, no question as to the rule against perpetuities was raised.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(1) LIMITS OF PERIOD OF ACCUMULATION/1119. Limitation of accumulation.

3. RESTRICTION OF ACCUMULATION

(1) LIMITS OF PERIOD OF ACCUMULATION

1119. Limitation of accumulation.

Trusts for accumulation and dispositions directly or indirectly causing accumulation, wholly or partially, of the rents, profits or income of any real or personal property must, in addition to complying with the rule against perpetuities, be confined (with certain statutory and other exceptions¹) to one or other of certain alternative statutory periods, any one of which, but not more than one, may be chosen². The restrictions apply to powers to accumulate as well as to imperative trusts for accumulation³.

Where, however, beneficiaries can terminate the accumulations under the rule in *Saunders v Vautier*⁴, it is outside the mischief of the rule against accumulations. The mere retention of income is not sufficient to attract the statutory provisions against accumulation⁵.

1 Apart from the statutory exceptions (see PARAS 1132-1140 post), certain transactions have been held to be outside the statutory restrictions on accumulation: see PARAS 1141-1145 post.

2 See PARA 1121 post.

3 *Re Robb, Marshall v Marshall* [1953] Ch 459, [1953] 1 All ER 920; and see *Baird v Lord Advocate* [1979] AC 666 at 675, [1979] 2 All ER 28 at 34, HL, where *Re Robb, Marshall v Marshall* supra was accepted as correct also in Scottish law on this point. See also *Re Earl of Berkeley, Inglis v Countess Berkeley* [1968] Ch 744 at 777, 780, [1968] 3 All ER 364 at 381, 383, CA. The point is given statutory effect by the Perpetuities and Accumulations Act 1964 s 13 (2): see PARA 1121 note 8 post. See also the Fourth Report of the Law Reform Committee (1956) (Cmd 18) PARA 60. As to the statutory duty of trustees to accumulate income not applied in maintenance during a minority see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 61-65. As to the repayment of tax in respect of income accumulated see INCOME TAXATION vol 23(2) (Reissue) PARA 1552. Repaid tax belongs to the beneficiary: see *Re Fulford, Fulford v Hyslop* [1930] 1 Ch 71, distinguished in *Re Cameron, Kingsley v IRC* [1967] Ch 1, [1965] 3 All ER 474. As to the liability of trustees to additional rate tax in respect of accumulated income see INCOME TAXATION vol 23(2) (Reissue) PARA 1566.

4 For a statement of the rule in *Saunders v Vautier* (1841) Cr & Ph 240 see PARA 1120 post; Morris and Leach's Rule against Perpetuities (2nd Edn) 286-292; and WILLS. The Perpetuities and Accumulations Act 1964 s 2 (presumptions and evidence as to future parenthood: see PARA 1066 ante) is applicable to any question as to the beneficiaries' right to put an end to accumulations of income under any disposition as it applies to questions arising on the rule against perpetuities: see s 14 and PARA 1066 ante. For the meaning of 'disposition' see PARA 1009 note 1 ante.

5 See *Re Earl of Berkeley, Inglis v Countess Berkeley* [1968] Ch 744, [1968] 3 All ER 364, CA, where the retention of surplus income as a safeguard against future deficiencies in an annuity fund was held to be outside the rule. Harman LJ was prepared to hold that this was not an 'accumulation' at all: see *Re Earl of Berkeley, Inglis v Countess Berkeley* supra at 772 and at 378. Cf *Earl of Berkeley, Inglis v Countess Berkeley* supra at 776 and at 380 per Russell LJ (a 'de facto accumulation').

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(1) LIMITS OF PERIOD OF ACCUMULATION/1120. Application of the perpetuity rule.

1120. Application of the perpetuity rule.

Whatever the date of the instrument, or the purpose of the accumulation, not being for the payment of debts or incumbrances¹, trusts and provisions for accumulation are subject to the rule against perpetuities. A trust for accumulation for any period for the benefit of any person is not invalid, however, if the person has a vested interest, since in this case he is not bound to wait until the expiration of the fixed period, but may stop the accumulation and require payment the moment he is competent to give a valid discharge². This principle applies in the case of trusts for accumulation for charities³, but does not apply unless the interest of the person or charity in the accumulated sum is absolute⁴ and free from conditions precedent extending beyond the perpetuity period⁵.

The mere fact that a beneficiary is solely entitled to income does not entitle him to call for the corpus⁶. If the true construction of the gift is inconsistent with an intention that he should be able to call for the capital, then, unless the beneficiary is a charity, the gift may be void for perpetuity and cannot be saved on the ground that an indefinite gift of income entitles the donee to call for the corpus and put an end to the trusts of income⁶. Even where the donee is a charity it would not be entitled to call for the corpus in those circumstances⁶. Where there is a possibility of another beneficiary coming into existence, the existing beneficiaries cannot bring themselves within the principle; and it seems that the court will not for the purpose of closing the class of beneficiaries presume that a woman is past child-bearing⁷.

When, however, the accumulation is under an instrument to which the Perpetuities and Accumulations Act 1964 applies⁸, there is a statutory presumption⁹ that a female over the age of 55 is past child-bearing. The restriction by which an accumulation must be so limited as necessarily to come to an end, or be determinable on the beneficiaries attaining vested interests, within the perpetuity period¹⁰, is the only restriction in cases not coming within the statutory provisions restricting accumulations¹¹ mentioned subsequently¹².

1 As to the exception of accumulations to pay off debts or incumbrances see PARAS 1053, 1054 ante; and see PARAS 1132, 1133 post.

2 *Saunders v Vautier* (1841) Cr & Ph 240; *Gosling v Gosling* (1859) John 265; *Coventry v Coventry* (1865) 2 Drew & Sm 470. Cf *Re Couturier, Couturier v Shea* [1907] 1 Ch 470; *Smidmore v Makinson* (1908) 6 CLR 243; *Re AEG Unit Trust (Managers) Ltd's Deed, Midland Bank Executor and Trustee Co Ltd v AEG Unit Trust (Managers) Ltd* [1957] Ch 415, [1957] 2 All ER 506. As to the general application of the principle stated in the text in relation to the rule against perpetuities see PARA 1052 ante. As to its effect on the rights of persons who would be entitled to the income directed to be accumulated if the accumulation were invalid see PARA 1152 post; and see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 485 and TRUSTS.

3 *Wharton v Masterman* [1895] AC 186; *Re Swain, Monckton v Hands* [1905] 1 Ch 669, CA. Cf *Re Knapp, Spreckley v A-G* [1929] 1 Ch 341. See also CHARITIES vol 8 (2010) PARA 144.

4 *Re Blake, Berry v Geen* [1938] AC 575, [1938] 2 All ER 362, HL.

5 *Marshall v Holloway* (1820) 2 Swan 432 (cited in PARA 1051 note 4 ante); *Smith v Cuninghame* (1884) 13 LR 480; *Trustees, Executors and Agency Co v Bush* (1908) 28 NZLR 117; *Re Jefferies, Finch v Martin* [1936] 2 All ER 626; and see PARA 1052 ante.

6 See *Re Levy, Barclays Bank Ltd v Board of Guardians and Trustees for the Relief of the Jewish Poor* [1960] Ch 346 at 363, [1960] 1 All ER 42 at 50, CA.

7 *Re Deloitte, Griffiths v Deloitte* [1926] Ch 56, where, in the absence of such a presumption, the provision for accumulation violated the statutory restrictions cited in PARA 1121 post. See also *Edwards v Tuck* (1853) 3 De GM & G 40 at 64, 72; *Re Travis, Frost v Grestorex* [1900] 2 Ch 541, CA; *Teague v Trustees, Executors and Agency Co Ltd* (1923) 32 CLR 252 (cases concerning the disposition of accumulations beyond the period permitted by statute). *Re Deloitte, Griffiths v Deloitte* supra was applied in *Re Blake, Berry v Geen* [1937] Ch 325, [1937] 1 All ER 742, CA, but was doubted on appeal to the House of Lords in *Re Blake, Berry v Geen* [1938] AC 575 at 584, [1938] 2 All ER 362 at 367, HL. The view that the court will not presume a woman to be past child-bearing which was expressed in *Re Deloitte, Griffiths v Deloitte* supra was, however, treated as binding on a court of first instance in *IRC v Bernstein* [1960] Ch 444 at 455, [1960] 1 All ER 697 at 702, although the point was not mentioned on appeal [1961] Ch 399, [1961] 1 All ER 320, CA. See also *Re Pettifor's Will Trusts, Roberts v Roberts* [1966] Ch 257 at 260, [1966] 1 All ER 913 at 915 (woman aged 78); *Fry v IRC* [1959] Ch 86 at 93, [1958] 1 All ER 819 at 823; on appeal [1959] Ch 86, [1958] 3 All ER 90, CA. As to the presumptions and evidence as to future parenthood for the purpose of the rule against perpetuities see PARA 1066 ante; and as to a child born after his father's death see PARA 1026 ante.

8 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

9 See *ibid* ss 2 (1) (a), 14 and PARA 1066 ante. The presumption is rebuttable: see s 2 (1) (b) and PARA 1066 ante.

10 As to this period see PARA 1012 ante. It is doubtful whether this has been changed by the Perpetuities and Accumulations Act 1964: see PARA 1121 post.

11 In the Law of Property Act 1925 s 164 (1) (see PARA 1121 post) and s 166 (1) (see PARA 1122 post), and, in relation to instruments to which the Perpetuities and Accumulations Act 1964 applies, s 13 (see PARA 1121 post).

12 *Harrison v Harrison* (1787) (cited in *Thellusson v Woodford* (1799) 4 Ves 227 at 286, 338; *affd* (1805) 11 Ves 112, HL); *Shaw v Rhodes* (1835) 1 My & Cr 135 at 154 (*affd sub nom Evans v Hellier* (1837) 5 Cl & Fin 114, HL); *Curtis v Lukin* (1842) 5 Beav 147; *Wilson v Wilson* (1851) 1 Sim NS 288 at 298. For cases of accumulations void on this ground see PARA 1124 note 3 post.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(1) LIMITS OF PERIOD OF ACCUMULATION/1121. General statutory restrictions on accumulation of income.

1121. General statutory restrictions on accumulation of income.

Subject to certain exceptions¹, property² may not be settled or disposed of³ by any person⁴ by an instrument made on or after 28 July 1800⁵, or otherwise than by instrument, in such a manner that the income⁶ is to be wholly or partially⁷ accumulated⁸ for any period longer than one or other of certain periods laid down by statute⁹. These periods are:

- 49 (1) the life of the grantor or settlor¹⁰;
- 50 (2) a term of 21 years from the death of the grantor, settlor or testator¹¹;
- 51 (3) the duration of the minority¹² or respective minorities of any person or persons living or en ventre sa mère at the death of the grantor, settlor or testator¹³; and
- 52 (4) the duration of the minority¹⁴ or respective minorities only of any person or persons who, under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated¹⁵.

Two further periods are available in respect of instruments to which the Perpetuities and Accumulations Act 1964 applies¹⁶, namely:

- 53 (a) a term of 21 years from the date of the making of the disposition¹⁷; and
- 54 (b) the duration of the minority or respective minorities of any person or persons in being¹⁸ at the date of the disposition¹⁹.

These periods are alternative, and only one may be chosen; two or more of them cannot be made consecutive periods for accumulation²⁰. Any shorter period may be chosen. The mode of determining which is the appropriate period, in a case where none is expressly chosen in the instrument, is mentioned subsequently²¹.

The general statutory restrictions on accumulation have been held inapplicable to a unit trust scheme²². A corporation is not a person for these purposes; the statutory restrictions on accumulation do not, therefore, apply where the property is settled or disposed of by a corporation²³.

1 As to the statutory exceptions to the general statutory restrictions on accumulations see PARAS 1132-1140 post; and as to other cases in which the restrictions have been held to be inapplicable see PARAS 1141-1145 post.

2 For these purposes, 'property' includes any thing in action and any interest in real or personal property: Law of Property Act 1925 s 205 (1) (xx).

3 For these purposes, 'disposition' includes a conveyance, devise, bequest or an appointment of property contained in a will; and 'dispose of' has a corresponding meaning: *ibid* s 205 (1) (ii).

4 For the meaning of 'person' see text and note 23 *infra*.

5 See the Law of Property Act 1925 s 164 (3). For these purposes, 'instrument' does not include a statute unless the statute creates a settlement: s 205 (1) (viii). In the case of wills s 164 applies, however, only where the testator was living and of testamentary capacity after the end of one year from 28 July 1800: s 164 (3), replacing a corresponding provision in the Accumulations Act 1800 ss 1, 4 (repealed: see note 9 *infra*).

6 For these purposes, 'income' includes rents and profits: Law of Property Act 1925 s 205 (1) (xix).

7 Instances of a provision for partial accumulation includes a provision for accumulating a specific aliquot part of rents (*Shaw v Rhodes* (1835) 1 My & Cr 135 at 155), or the excess of income over a certain sum (*Trickey v Trickey* (1832) 3 My & K 560) or over what is applied for other purposes (*Mathews v Keble* (1868) 3 Ch App 691; *Re Bradwell, Goode v Board of Trustees for Methodist Church Purposes* [1952] Ch 575, [1952] 2 All ER 286).

8 For the meaning of 'accumulation' see PARA 1126 post. The statutory provisions apply to powers to accumulate as well as to imperative trusts: see PARA 1119 ante. See also the Perpetuities and Accumulations Act 1964 s 13 (2) which expressly declares that the restrictions imposed by the Law of Property Act 1925 s 164 apply in relation to a power to accumulate income whether or not there is a duty to exercise that power, and that they apply whether or not the power to accumulate extends to income produced by the investment of income previously accumulated.

9 *Ibid* s 164 (1). Section 164 replaces with amendments the Accumulations Act 1800 (repealed as to England and Wales by the Law of Property Act 1925 s 207, Sch 7). The Accumulations Act 1800 originated in the discussion produced by the will which came before the court in *Thellusson v Woodford* (1799) 4 Ves 227 (affd (1805) 11 Ves 112, HL), and was commonly called the Thellusson Act.

10 Law of Property Act 1925 s 164 (1) (a). See also text and note 23 *infra*.

11 *Ibid* s 164 (1) (b).

12 The age of majority was reduced from 21 years to 18 years by the Family Law Reform Act 1969 with effect from 1 January 1970: see s 1; Family Law Reform Act 1969 (Commencement No 1) Order 1969, SI 1969/1140, art 2. A reference to 'minority' in any deed, will or other instrument made on or after 1 January

1970, or in any statutory provision, whether passed before or after that date, is to be construed as a reference to the attainment of the age of 18: see the Family Law Reform Act 1969 s 1 (2) (a), (b). The consequent change in the construction of the Law of Property Act 1925 ss 164, 166, and in the Perpetuities and Accumulations Act 1964 s 13 (1) (see *infra*), is not, however, to invalidate any direction for accumulation in a settlement or other disposition made by deed, will or other instrument made prior to 1 January 1970: Family Law Reform Act 1969 s 1 (4), Sch 3 para 7.

13 Law of Property Act 1925 s 164 (1) (c).

14 An accumulation directed during a conventional minority (eg until some person attains the age of 25) takes effect subject to *ibid* s 164: see *Fulford v Hardy* [1909] AC 570 at 575, PC.

15 Law of Property Act 1925 s 164 (1) (d). See *McIver v IRC* [1973] STC 398, where it was held that the period of a beneficiary's minority could not be used because his interest was contingent on attaining the age of 22, and he was not therefore a person who, if of full age, would have been entitled.

16 See the Perpetuities and Accumulations Act 1964 s 13 (1). As to instruments to which that Act applies see PARA 1009 note 2 *ante*.

17 *Ibid* s 13 (1) (a), effectively reversing *Jagger v Jagger* (1883) 25 ChD 729 at 733. For the meaning of 'disposition' see PARA 1009 note 1 *ante*.

18 For the meaning of 'in being' see PARA 1011 note 3 *ante*.

19 Perpetuities and Accumulations Act 1964 s 13 (1) (b).

20 *Re Lady Rosslyn's Trust* (1848) 16 Sim 391; *Wilson v Wilson* (1851) 1 Sim NS 288; *Jagger v Jagger* (1883) 25 ChD 729; *Re Errington, Errington-Turbutt v Errington* (1897) 76 LT 616.

21 See PARA 1130 *post*.

22 See PARA 1145 *post*.

23 See *Re Dodwell and Co Ltd's Trust, Baker v Timmins* [1979] Ch 301, [1978] 3 All ER 738.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(1) LIMITS OF PERIOD OF ACCUMULATION/1122. Restriction on accumulation for the purchase of land.

1122. Restriction on accumulation for the purchase of land.

In the case of a settlement¹ or disposition² made after 27 June 1892³, no person may settle or dispose of any property in such manner that the income thereof shall be wholly or partially accumulated for the purchase of land⁴ only, for any longer period than the duration of the minority or respective minorities of any person or persons who, under the limitations of the instrument⁵ directing the accumulation, would for the time being, if of full age, be entitled to the income⁶ directed to be accumulated⁷.

1 For these purposes, 'settlement' has the same meaning as in the Settled Land Act 1925 (see SETTLEMENTS vol 42 (Reissue) PARA 601); Law of Property Act 1925 s 205 (1) (xxvi).

2 For the meaning of 'disposition' see PARA 1121 note 3 *ante*.

3 See the Law of Property Act 1925 s 166 (3). Section 166 replaces the Accumulations Act 1892 s 1 (repealed as to England and Wales by the Law of Property Act 1925 s 207, Sch 7), which came into effect on 28 June 1892 and was held to apply to a will which was made before that date but came into operation after that date: *Re Baroness Llanover, Herbert v Freshfield* (2) [1903] 2 Ch 330.

4 For the meaning of 'land', which includes an incorporeal hereditament, see the Law of Property Act 1925 s 205 (1) (ix) and REAL PROPERTY vol 39(2) (Reissue) PARA 77. A direction to invest in stocks to produce a fund to be

invested in the purchase of real estate on a contingency is a direction for the purchase of land: *Re Clutterbuck, Fellowes v Fellowes* [1901] 2 Ch 285, not following a dictum in *Re Danson, Danson v Bell* (1895) 11 TLR 455.

5 For the meaning of 'instrument' see PARA 1121 note 4 ante.

6 For the meaning of 'income' see PARA 1121 note 6 ante.

7 Law of Property Act 1925 s 166 (1). See *McIver v IRC* [1973] STC 398 (cited in PARA 1121 note 15 ante). As to the exception from the application of the Law of Property Act 1925 s 166 (1) in the case of accumulations to be held as capital money for the purposes of the Settled Land Act 1925 see PARA 1140 post; and as to the effect of doctrines as to the conversion of estates and the payment of legacies on directions to invest accumulations in land see PARA 1129 post.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(1) LIMITS OF PERIOD OF ACCUMULATION/1123. Qualification of restrictions.

1123. Qualification of restrictions.

Where accumulations of surplus income¹ are made during a minority² under any statutory power or under the general law, the period for which those accumulations are made is not to be taken into account in determining the periods for which accumulations are permitted to be made under the general statutory restrictions³ on accumulation⁴. Accordingly, an express trust for accumulation for any other permitted period is not deemed to have been invalidated or become invalid by reason of accumulations also having been made during such minority⁵.

1 For the meaning of 'income' see PARA 1121 note 6 ante.

2 As to the age of majority see PARA 1121 note 12 ante. See further PARA 1131 post.

3 See the Law of Property Act 1925 s 164 (1) and, in relation to instruments to which the Perpetuities and Accumulations Act 1964 applies, s 13 (1): see PARA 1121 ante.

4 Law of Property Act 1925 s 165. As to the statutory duty of trustees to accumulate surplus income during a minority see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 61-65.

5 Ibid s 165. See *Re Maber, Ward v Maber* [1928] Ch 88 (minority supervening on accumulation directed by order of court).

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(1) LIMITS OF PERIOD OF ACCUMULATION/1124. Effect of excessive accumulation.

1124. Effect of excessive accumulation.

In so far as an accumulation is directed for any period longer than the statutory periods¹, the direction is void². If the period fixed by the instrument may exceed the perpetuity period, the direction is entirely void³; but, if it does not exceed the perpetuity period, or is necessarily determinable by beneficiaries within that period, the direction is not entirely void, but is valid to the extent of such of the statutory periods⁴ as is appropriate, and is invalid for the excess over that statutory period⁵. Where the purposes of accumulation include a purpose affected by either of the statutory provisions against accumulation⁶, the effect is to strike out the purpose in question from the direction to accumulate so far as the statutory provision is infringed⁷.

1 As to the statutory periods see PARA 1121 ante.

2 See the Law of Property Act 1925 s 164 (1). As to the application of excess accumulations see PARA 1146 et seq post.

3 *Lord Southampton v Marquis of Hertford* (1813) 2 Ves & B 54; *Marshall v Holloway* (1820) 2 Swan 432; *Palmer v Holford* (1828) 4 Russ 403; *Vawdry v Geddes* (1830) 1 Russ & M 203; *Porter v Fox* (1834) 6 Sim 485; *Griffith v Blunt* (1841) 4 Beav 248; *Curtis v Lukin* (1842) 5 Beav 147; *Browne v Stoughton* (1846) 14 Sim 369; *Scarisbrick v Skelmersdale* (1850) 17 Sim 187; *Turvin v Newcome* (1856) 3 K & J 16; *Smith v Cuninghame* (1884) 13 LR Ir 480; and see *Baker v Stuart* (1897) 28 OR 439; *Girard Trust Co v Russell* 179 F 446 (US 1910); Lewis's Law of Perpetuity 592; and see PARA 1120 ante. The preponderance of academic opinion appears to be that the 'wait and see' provisions of the Perpetuities and Accumulations Act 1964 s 3 (1)-(3) (see PARA 1009 ante) are not available in respect of directions to accumulate: Cheshire and Burn's Modern Law of Real Property (14th Edn) 318; Megarry and Wade's Law of Real Property (5th Edn) 304; Maudsley's Modern Law of Perpetuities 207, 208; and see Underhill's Law of Trusts and Trustees (14th Edn) 154. It has, however, been suggested that the Perpetuities and Accumulations Act 1964 s 3 (3), which applies to 'a disposition consisting of the conferring of any power, option or other right ... void on the ground that the right might be exercised at too remote a time', may extend to accumulations: see Megarry and Wade's Law of Real Property (5th Edn) 280, 305. Cf the Law Reform (Property, Perpetuities and Succession) Act 1962 (Western Australia) s 17; and see (1962) 6 WAL Rev 70.

4 See PARA 1121 ante. In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies, there are six statutory periods: see PARA 1121 ante.

5 *Griffiths v Vere* (1803) 9 Ves 127; *Longdon v Simson* (1806) 12 Ves 295; *Shaw v Rhodes* (1835) 1 My & Cr 135 at 154 (affd sub nom *Evans v Hellier* (1837) 5 Cl & Fin 114, HL); *Blease v Burgh* (1840) 2 Beav 221; *Re Lady Rosslyn's Trust* (1848) 16 Sim 391; *Re Errington, Errington-Turbutt v Errington* (1897) 76 LT 616; *Inne's Trustees v Bowen* 1920 SC 133; *Re Watt's Will Trusts, Watt v Watt* [1936] 2 All ER 1555.

6 See the Law of Property Act 1925 s 164 (1) (see PARA 1121 ante) and s 166 (1) (see PARA 1122 ante).

7 *Re Baroness Llanover, Herbert v Freshfield* (2) [1903] 2 Ch 330 at 335. Cf *Vine v Raleigh* [1891] 2 Ch 13 at 16, CA; *Re Mason, Mason v Mason* [1891] 3 Ch 467. A direction for accumulation, including accumulation for payment of debts, is good if unlimited in time, so far as that purpose is concerned: *Lord Southampton v Marquis of Hertford* (1813) 2 Ves & B 54; *Re Earl of Stamford and Warrington, Payne v Grey* [1912] 1 Ch 343, CA.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(1) LIMITS OF PERIOD OF ACCUMULATION/1125. Property subject to the statutory restrictions.

1125. Property subject to the statutory restrictions.

The property subject to the statutory provisions¹ includes English land devised by the will of a testator domiciled abroad², but not property the rights in which are governed by the law of any other country where such provisions are not in force³.

A direction in the will of a testator domiciled in England that the income of his residuary personal estate is to be invested in landed property in a country where such provisions have not been adopted does not render the statutory provisions inapplicable⁴.

1 See the Law of Property Act 1925 ss 164 (1), 166(1) and, in relation to instruments to which the Perpetuities and Accumulations Act 1964 applies, s 13 (1): see PARAS 1121, 1122 ante. The 1964 Act applies to England and Wales only: see s 15 (9) and the long title.

2 *Freke v Lord Carbery* (1873) LR 16 Eq 461; and see *Re Grassi, Stubberfield v Grassi* [1905] 1 Ch 584 at 592, cited with approval in *Re Manifold, Slater v Chryssaffinis* [1962] Ch 1 at 14-16, [1961] 1 All ER 710 at 716-718, where it was held that provisions in the will of a testator of foreign domicile infringing the Accumulations Act 1800 (repealed) (commonly called Thellusson's Act: see PARA 1121 note 9 ante) or the English rule against perpetuities was not validated by the Wills Act 1861 (repealed and replaced by the Wills Act 1963: see WILLS vol 50 (2005 Reissue) PARAS 310, 386). See also CONFLICT OF LAWS vol 8(3) (Reissue) PARA 451. Cf para 1025 ante.

3 *Haldane v Eckford* (1871) 24 LT 934 (testator domiciled in Jersey); *Ellis v Maxwell* (1849) 12 Beav 104 (Irish land; in this case, however, the restrictions on accumulation under English law were held to affect the accumulated income of accumulated rents); *Heywood v Heywood* (1860) 29 Beav 9 (funds settled by Irish settlement and to be invested in British government funds). The Law of Property Act 1925 applies to England and Wales only: see s 209 (3). The Accumulations Act 1800 (see PARA 1121 note 9 ante), does not apply to Northern Ireland, since it was passed before the Union with Ireland Act 1800 came into effect, but the Accumulations Act 1892 (see PARA 1122 note 3 ante) applies: see *Shillington v Portadown UDC* [1911] 1 IR 247 at 261.

4 *Macpherson v Stewart* (1858) 28 LJ Ch 177.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(1) LIMITS OF PERIOD OF ACCUMULATION/1126. What directions are within the rules.

1126. What directions are within the rules.

Accumulation within the meaning of the statutory provisions¹ is directed by any expression denoting that the whole or part of the income of property is to be separated from the ownership of that property, so as either to form, or to be an accretion to, the capital of any fund²; or so as to be a postponement of, and restriction on, the beneficial enjoyment of the property³.

1 See the Law of Property Act 1925 ss 164 (1), 166(1) and, in relation to instruments to which the Perpetuities and Accumulations Act 1964 applies, s 13: see PARAS 1121, 1122 ante.

2 Eg directions to add dividends to capital (*Webb v Webb* (1840) 2 Beav 493; *Martin v Maugham* (1844) 14 Sim 230), to invest income to form a subsequent gift (*Mathews v Keble* (1868) 3 Ch App 691; *Smith v Cuninghame* (1884) 13 LR Ir 480; *Re Walker, Walker v Walker* (1886) 54 LT 792; *Re Mason, Mason v Mason* [1891] 3 Ch 467), to place the income in certain investments (*Macpherson v Stewart* (1858) 28 LJ Ch 177), to 'retain and set apart' income (*Re Cox, Cox v Edwards* [1900] WN 89; and see *Bateman v Hotchkin* (1847) 10 Beav 426), or to form a reserve fund (*Re Swain, Monckton v Hands* [1905] 1 Ch 669, CA; *Re Hurlbatt, Hurlbatt v Hurlbatt* [1910] 2 Ch 553), or a sinking fund (*Bateman v Hotchkin* supra; *Varlo v Faden* (1859) 1 De GF & J 211), or an endowment fund (*Re Bradwell, Goode v Board of Trustees for Methodist Church Purposes* [1952] Ch 575, [1952] 2 All ER 286). Cf *Re Earl of Berkeley, Inglis v Countess Berkeley* [1968] Ch 744, [1968] 3 All ER 364, CA, where the retention by trustees of surplus income as an administrative precaution to secure future payments of annuities was held not to be an accumulation for the purposes of the Law of Property Act 1925 s 164(1). The mere fact of the word 'accumulations' being used does not constitute such a direction if the accumulation is not the result of any direction by the testator: see *Bridgnorth Corp v Collins* (1847) 15 Sim 538 at 540; *Mitchell's Trustees v Fraser* 1915 SC 350. As to the circumstances in which accumulation may be implied see PARA 1128 post. The statutory provisions apply to powers to accumulate as well as to imperative trusts for accumulation: see PARA 1119 text and note 3 ante. A direction to accumulate, even if express, will not be enforced if the object of the accumulation has failed: *Re Thornber, Crabtree v Thornber* [1937] Ch 29, [1936] 2 All ER 1594, CA. A trust to accumulate may be an expression of a contrary intention within the meaning of the Trustee Act 1925 s 69 (2), so as to exclude the application to an instrument of the statutory provisions as to maintenance or advancement contained in ss 31, 32: see *Re Turner's Will Trusts, District Bank Ltd v Turner* [1937] Ch 15, [1936] 2 All ER 1435, CA; *Re Watt's Will Trusts, Watt v Watt* [1936] 2 All ER 1555; *Re Ransome, Moberly v Ransome* [1957] Ch 348 at 365, [1957] 1 All ER 690 at 698; *IRC v Bernstein* [1960] Ch 444, [1960] 1 All ER 697 (affd [1961] Ch 399, [1961] 1 All ER 320, CA). For a criticism of *Re Ransome, Moberly v Ransome* supra see (1979) CPL 423. Where trustees of a discretionary trust resolve to allocate income to an object of the trust, the Trustee Act 1925 s 31 has no application to the sum so allocated: see *Re Baron Vestey's Settlement, Lloyds Bank Ltd v O'Meara* [1951] Ch 209 at 224, [1950] 2 All ER 891 at 902, CA. See also *IRC v Ward* [1970] NZLR 1 (NZ CA). As to the statutory powers of maintenance and advancement see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 61-65, 76-79. Notwithstanding an express power of advancement, statutory powers of maintenance and advancement are not exercisable during the accumulation period: *Re Henderson's Trusts, Schreiber v Baring* [1969] 3 All ER 769 at 775, 776, [1969] 1 WLR 651 at 659, 660, CA. Cf *IRC v Bernstein* [1961] Ch 399 at 416, [1961] 1 All ER 320 at 327, CA. See also *Re Erskine's Settlement Trusts, Hollis v Pigott* [1971] 1 All ER 572, [1971] 1 WLR 162, where a direction to accumulate, although void under the Law of Property Act 1925 s 164, was held to be a sufficient expression of contrary intention for the purposes of the Trustee Act 1925 s 69 (2). Cf *Re Geering, Gulliver v Geering* [1964] Ch 136 at 148, [1962] 3 All ER 1043 at

1050. In *Re Rochford's Settlement Trusts*, *Rochford v Rochford* [1965] Ch 111 at 125, [1964] 2 All ER 177 at 184, Cross J stated that the application of income in reducing the burden of a charge on capital was an accumulation.

3 See the preamble to the Accumulations Act 1800 (repealed and replaced by the Law of Property Act 1925 s 164: see PARA 1121 note 9 ante); and see *Vine v Raleigh* [1891] 2 Ch 13, CA (where an application of income for improvements was held not to be a postponement of beneficial enjoyment); *Re Earl of Berkeley*, *Inglis v Countess Berkeley* [1968] Ch 744 at 776, [1968] 3 All ER 364 at 380 (where the retention of income in due course of administration by trustees who were uncertain about the availability of assets to meet beneficial claims was held not to be a postponement of beneficial enjoyment by the beneficiary because, until the uncertainty is resolved, the beneficiary has no present right to be paid). See also *Baird v Lord Advocate* [1979] AC 666, [1979] 2 All ER 28, HL (a Scottish case) (implied direction).

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(1) LIMITS OF PERIOD OF ACCUMULATION/1127. Interest.

1127. Interest.

It seems that the accumulation may be either at simple or compound interest, that is, the income derived from capitalised income may be itself capitalised or not¹. In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies², there is a statutory provision to that effect³.

1 *Colquhoun v Colquhoun's Trustees* (1892) 19 R (Ct of Sess) 946; *Mackay's Trustees v Mackay* 1909 SC 139 at 143; *Wentworth v Wentworth* [1900] AC 163 at 170, PC; and see *Re Earl of Berkeley*, *Inglis v Countess Berkeley* [1968] Ch 154 at 165, [1967] 3 All ER 170 at 176, where *Re Hawkins*, *White v White* [1916] 2 Ch 570 was cited with approval by Cross J; and see also Morris and Leach's Rule against Perpetuities (2nd Edn) 279, 280. *Re Earl of Berkeley*, *Inglis v Countess Berkeley* supra was affirmed on appeal at [1968] Ch 744, [1968] 3 All ER 364, CA. The matter is not entirely free from doubt: see the cases cited in PARA 1128 note 4 post; *Union Bank of Scotland Ltd v Campbell* 1929 SC 143; and the Fourth Report of the Law Reform Committee (1956) (Cmd 18) PARA 60.

2 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

3 See *ibid* s 13 (2) and PARA 1121 note 8 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(1) LIMITS OF PERIOD OF ACCUMULATION/1128. Circumstances in which accumulation is implied.

1128. Circumstances in which accumulation is implied.

Accumulation may be implied from the form or nature of a gift, where the substantial meaning of the limitation requires that accumulation is to take place, or where accumulation would be the inevitable result of the limitation either generally or upon certain contingencies¹. This is a question of construction, determined as if no statutory provisions restricting accumulation existed².

It seems that there is an implied trust to accumulate where surplus income of a fund, accruing after the expiration of the statutory period³, is directed to be added to the capital of settled residue, and the direction fails accordingly⁴.

A trust for accumulation implied in the gift arises where residuary personal estate is bequeathed on a future contingency and the gift carries intermediate income; pending the

contingency there is an implied accumulation, which is valid for one only of the statutory periods⁵. Where, however, there is a gift of residue for life with remainder contingent upon surviving the life interest, then, on the failure of the life interest for any reason, such as disclaimer, the income cannot be accumulated pending the contingency, for, by giving away the life interest, the testator may be taken to have evinced an intention against accumulation⁶.

The fact that rents which do not fall due until after the expiration of the statutory period and are to be apportioned to that period will not be received until after the end of that period does not involve infringement of the statutory provisions against accumulation⁷.

1 *Shaw v Rhodes* (1835) 1 My & Cr 135 (affd sub nom *Evans v Hellier* (1837) 5 Cl & Fin 114, HL); *Morgan v Morgan* (1851) 4 De G & Sm 164; *Tench v Cheese* (1855) 6 De GM & G 453 at 462, followed in *Mathews v Keble* (1868) 3 Ch App 691 at 696; *Lord v Colvin* (1860) 23 Dunl (Ct of Sess) 111; *Smyth's Trustees v Kinloch* (1880) 7 R (Ct of Sess) 1176. If *Elborne v Goode* (1844) 14 Sim 165 at 175, 176 and *Bridgnorth Corp v Collins* (1844) 15 Sim 538 at 540 amount to dicta or decisions that, where there is no express direction to accumulate, the statute does not apply, these cases are not followed. See also *Inne's Trustees v Bowen* 1920 SC 133 (accumulation of residue of income by trustees to compensate disappointed beneficiaries); *Moss's Trustees v Bramwell* 1935 SC 123; *Re Robb, Marshall v Marshall* [1953] Ch 459 at 466, [1953] 1 All ER 920 at 923 (overruled on another point in *Re Earl of Berkeley, Inglis v Countess Berkeley* [1968] Ch 744, [1968] 3 All ER 364, CA); *Re Rochford's Settlement Trusts, Rochford v Rochford* [1965] Ch 111 at 122, 123, [1964] 2 All ER 177 at 183 (accumulation implied from a direction to pay estate duty); *Royal Bank of Scotland v Lord Advocate* 1977 SC 116. It seems that the implication can arise regardless of whether any income is actually produced: *Royal Bank of Scotland v Lord Advocate* supra at 135, 136.

2 *Shaw v Rhodes* (1835) 1 My & Cr 135 at 153, 155 (affd sub nom *Evans v Hellier* (1837) 5 Cl & Fin 114, HL); *Tench v Cheese* (1855) 6 De GM & G 453 at 466; *Campbell's Trustees v Campbell* 1891 18 R (Ct of Sess) 992.

3 As to the statutory periods within which accumulation is permitted see PARAS 1121, 1122 ante.

4 *Re Hawkins, White v White* [1916] 2 Ch 570 (following *Re Phillips, Phillips v Levy* (1880) 49 LJ Ch 198 and *Re Cababé, Cababé v Cababé* (1914) 59 Sol Jo 129 in preference to *Crawley v Crawley* (1835) 7 Sim 427; *O'Neill v Lucas* (1838) 2 Keen 313 and *Re Pope, Sharp v Marshall* [1901] 1 Ch 64); *Re Garside, Wragg v Garside* [1919] 1 Ch 132.

5 *Green v Ekins* (1742) 2 Atk 473; *M'Donald v Bryce* (1838) 2 Keen 276; *Countess Bective v Hodgson* (1864) 10 HL Cas 656 (distinguished in *Re Scott, Widdows v Friends of the Clergy Corp* [1975] 2 All ER 1033 at 1039, 1040, [1975] 1 WLR 1260 at 1266); *Pursell v Elder* (1865) 4 Macq 992, HL; *Wade-Gery v Handley* (1876) 1 ChD 653 (affd 3 ChD 374, CA); *Ralph v Carrick* (1877) 5 ChD 984 at 997 (affd (1879) 11 ChD 873, CA); *Re Hiscoe, Hiscoe v Waite* (1883) 48 LT 510; *Logan's Trustees v Logan* (1896) 23 R (Ct of Sess) 848; *Re Taylor, Smart v Taylor* [1901] 2 Ch 134. See also *Carey's Trustees v Rose* 1957 SC 252; *Re Geering, Gulliver v Geering* [1964] Ch 136, [1962] 3 All ER 1043 (where a direction to pay capital to beneficiaries out of the income of their contingent shares was held to be inconsistent with the application of the Trustee Act 1925 s 31 and therefore the income was to be accumulated).

6 See *Re Scott, Widdows v Friends of the Clergy Corp* [1975] 2 All ER 1033 at 1040, [1975] 1 WLR 1260 at 1266, explaining and applying dictum of Upjohn J in *Re Taylor, Lloyds Bank Ltd v Jones* [1957] 3 All ER 56 at 58, [1957] 1 WLR 1043 at 1045.

7 *St Aubyn v St Aubyn* (1861) 1 Drew & Sm 611 at 620. As to the apportionment of income accumulated under the Trustee Act 1925 s 31 see *Re Joel's Will Trusts, Rogerson v Brudenell-Bruce* [1967] Ch 14, [1966] 2 All ER 482.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(1) LIMITS OF PERIOD OF ACCUMULATION/1129. Effect of doctrines as to conversion of estate and payment of legacies.

1129. Effect of doctrines as to conversion of estate and payment of legacies.

The accumulations involved in a direction by will to invest a fund and its accumulations in the purchase of land¹, or to invest the proceeds of sale of land and the accumulated rents in

personal estate, may be confined to a permitted period² by the doctrine as to the time allowed for conversion and the payment of legacies³.

1 As to the period of accumulation permitted where the purpose of accumulation is the purchase of land see PARA 1122 ante; and as to the exception in favour of accumulations held as capital money for the purpose of the enactments relating to settled land see PARA 1140 post.

2 As to the permitted periods see PARAS 1121, 1122 ante.

3 *Sitwell v Bernard* (1801) 6 Ves 520; and see Jarman on Wills (8th Edn) 1212; Hargraves' Thellusson Act 159-161. As to the executor's year see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 379. See also *Re Petrie, Lloyds Bank Ltd v Royal National Institute for the Blind* [1962] Ch 355, [1961] 3 All ER 1067, CA; *Re Atkins' Will Trusts, National Westminster Bank Ltd v Atkins* [1974] 2 All ER 1, [1974] 1 WLR 761.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(1) LIMITS OF PERIOD OF ACCUMULATION/1130. Determination of appropriate statutory period.

1130. Determination of appropriate statutory period.

The question of which is the appropriate period¹ for which accumulation is validly directed is a question of construction of each instrument². That period is not necessarily the longest, nor the one which may best effectuate the intention to accumulate, but it is the one that actually fits the intention as declared by the instrument³. The court has to determine which of the permitted statutory periods⁴ the maker of the instrument has seemingly selected, determining the question by reference to the language employed and the facts of the case⁵. In selecting the period, not merely events which have actually happened, but those which might have happened, to affect the limitations of the instrument must be considered⁶. The appropriate period is nonetheless adhered to because accumulation is only directed to begin at some time after the commencement of the period, and therefore the trust either cannot continue for the full length of that period or is entirely ineffectual⁷.

1 There are four permitted periods under the Law of Property Act 1925 s 164 (1) (see PARA 1121 ante) but, in relation to instruments to which the Perpetuities and Accumulations Act 1964 applies (see PARA 1009 note 2 ante), a choice of a further two periods is available by virtue of s 13 (1) (see PARA 1121 ante). As to the period permitted for accumulation for the purchase of land see the Law of Property Act 1925 s 166 (1) and PARA 1122 ante.

2 The construction and effect of the instrument is unaffected by the statutory provisions relating to accumulations: see counsel's argument in *Re Rochford's Settlement Trusts, Rochford v Rochford* [1965] Ch 111 at 120; *Macpherson v Stewart* (1858) 28 LJ Ch 177.

3 *Re Errington, Errington-Turbutt v Errington* (1897) 76 LT 616 at 617 per Kekewich J; and see *Jagger v Jagger* (1883) 25 ChD 729 at 733. In a will, unless the accumulation is directed by reference to a minority or some personal event connected with a person who for the time being would be entitled, as under the alternative periods permitted (see PARA 1121 ante) the 21-year period is adopted: *Griffiths v Vere* (1803) 9 Ves 127; *Crawley v Crawley* (1835) 7 Sim 427; *Miles v Dyer* (1837) 8 Sim 330; *Tench v Cheese* (1855) 6 De GM & G 453. See also *Union Bank of Scotland Ltd v Campbell* 1929 SC 143; *Re Rawson, Rigby v Rawson* (1920) 124 LT 498 (direction to accumulate for six months 'after the declaration of peace terminating the present war'); *Carey's Trustees v Rose* 1957 SC 252. In the absence of reference to a minority, 21 years from the testator's death is also the appropriate period under the Perpetuities and Accumulations Act 1964 s 13 (1) (a) (see PARA 1121 ante), where the term runs from the date of the making of the disposition, as under s 15 (2) a disposition contained in a will is deemed to be made at the testator's death.

4 See note 1 supra.

5 *Re Watt's Will Trusts, Watt v Watt* [1936] 2 All ER 1555 at 1562; and see *Royal Bank of Scotland v Lord Advocate* 1977 SC 116 (implied direction limited to settlor's life); *Baird v Lord Advocate* [1979] AC 666, [1979] 2

All ER 28, HL (a Scottish case). Cf *Re Ransome, Moberly v Ransome* [1957] Ch 348 at 381, [1957] 1 All ER 690 at 696 (where this method of determining the maker's intention was said to be artificial and difficult); and see *Re Erskine's Settlement Trusts, Hollis v Pigott* [1971] 1 All ER 572, [1971] 1 WLR 162, following *Re Ransome, Moberly v Ransome* supra; *Brotherton v IRC* [1978] 2 All ER 267, [1978] 1 WLR 610, CA, where *Re Ransome, Moberly v Ransome* supra was noticed but not disapproved. For a criticism of *Re Ransome, Moberly v Ransome* supra see (1979) Conveyancer and Property Lawyer 423.

6 *Jagger v Jagger* (1883) 25 ChD 729 at 734 per Kay J. It seems that prior to the enactment of the Perpetuities and Accumulations Act 1964 the courts would not take into account the fact that a woman was past the age of child-bearing: see PARA 1120 ante. In relation to instruments to which that Act applies (see PARA 1009 note 2 ante), there is a statutory presumption that a woman over 55 years of age is past the age of child-bearing: see ss 2 (1) (a), 14 paras 1066, 1120 ante, 1152 post.

7 *Webb v Webb* (1840) 2 Beav 493; *A-G v Poulden* (1844) 3 Hare 555; *Lord v Colvin* (1860) 23 Dunl (Ct of Sess) 111; *Smith v Lomas* (1864) 33 LJ Ch 578; *Campbell's Trustees v Campbell* (1891) 18 R (Ct of Sess) 992; *Re Errington, Errington-Turbutt v Errington* (1897) 76 LT 616; *Re Travis, Frost v Greatorrex* [1900] 2 Ch 541, CA; *Re Cababé, Cababé v Cababé* (1914) 59 Sol Jo 129 (gift of annuities; surplus income to be accumulated until death of last annuitant; intestacy as to accumulations beyond the statutory period).

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(1) LIMITS OF PERIOD OF ACCUMULATION/1131. Calculation of periods.

1131. Calculation of periods.

In non-testamentary instruments to which alone the first of the statutory periods¹ is applicable, where accumulation is directed during the lives of strangers without a reference to any minority², it is valid for the period common to their lives and the settlor's life³.

The period of 21 years from the death of the settlor or testator which constitutes the second of the statutory periods is reckoned so as to go up to and include the twenty-first anniversary of his death and to follow immediately on his death⁴.

The term of a minority of any person living or en ventre sa mère at the time of the grantor's or testator's death which constitutes the third of the statutory periods is also reckoned to begin immediately on that death⁵.

The fourth of the statutory periods, where the minority is that of a person who would be entitled, if of full age, to the rents and profits to be accumulated, need not begin from the testator's death, and is not confined to persons born in the testator's or settlor's lifetime⁶.

In relation to dispositions⁷ under instruments to which the Perpetuities and Accumulations Act 1964 applies⁸, the two further periods available under that Act⁹ begin on the date on which the disposition is made¹⁰.

1 The four periods permitted for accumulations (other than accumulations for the purchase of land) by the Law of Property Act 1925 s 164 (1) (see PARA 1121 ante) and, in relation to instruments to which the Perpetuities and Accumulations Act 1964 applies (see PARA 1009 note 2 ante), two further periods provided by s 13 (1) (see PARA 1121 ante). As to the period permitted for accumulations for the purchase of land see the Law of Property Act 1925 s 166 (1) and PARA 1122 ante.

2 See PARA 1121 note 12 ante.

3 *Re Lady Rosslyn's Trust* (1848) 16 Sim 391; *Jagger v Jagger* (1883) 25 ChD 729. See also *Re Errington, Errington-Turbutt v Errington* (1897) 76 LT 616; *Stewart's Trustees v Stewart* 1927 SC 350; *Union Bank of Scotland Ltd v Campbell* 1929 SC 143; *Re Bourne's Settlement Trusts, Bourne v Mackay* [1946] 1 All ER 411, CA; and see *McIvers Trustees v Lord Advocate* 1973 SC 189 at 198. The headnote in this Scottish case is misleading in so far as it suggests that the grantor's life is the appropriate period unless he specifies a minority; the word used by Lord Fraser was 'directed'.

4 *Webb v Webb* (1840) 2 Beav 493; *Gorst v Lowndes* (1841) 11 Sim 434 (dividends due on the twenty-first anniversary of the testator's death held to be subject to the direction for accumulation); *A-G v Poulden* (1844) 3 Hare 555; *Campbell's Trustees v Campbell* (1891) 18 R (Ct of Sess) 992; *Carey's Trustees v Rose* 1957 SC 252.

5 *Jagger v Jagger* (1883) 25 ChD 729 at 733 per Kay J. In *Blasson v Blasson* (1864) 2 De GJ & Sm 665, where accumulation was directed until the children of A, B and C, born and living at the death of the testatrix, attained 21, it was held that a child en ventre sa mère was not included.

6 *Re Cattell, Cattell v Cattell* [1907] 1 Ch 567, CA. In accordance with the recommendations of the Fourth Report of the Law Reform Committee (1956) (Cmnd 18) PARA 59, this has not been changed by the Perpetuities and Accumulations Act 1964. The period extends to the minorities of persons born after the testator's or the settlor's death, and also to successive minorities: *Re Cattell, Cattell v Cattell, Re Cattell, Cattell v Dodd* [1914] 1 Ch 177, CA, not following the suggestion in *Haley v Bannister* (1820) 4 Madd 275 (which, however, was accepted as accurate in *Ellis v Maxwell* (1841) 3 Beav 587 at 597 and *Bryan v Collins* (1852) 16 Beav 14 at 17), and the dictum in *Jagger v Jagger* (1883) 25 ChD 729 at 733 per Kay J, that the statutory restrictions prevented accumulation of income during the minority of a child unborn at the testator's death or the date of the settlement. See also 2 Preston's Abstracts of Title (3rd Edn) 181; Hargrave's Thellusson Act 119-136; the Fourth Report of the Law Reform Committee (1956) (Cmnd 18) PARAS 58, 59. In *Longdon v Simson* (1806) 12 Ves 295, the period of 21 years was taken by the court as the limit. If the duration is during all such times as any person beneficially interested in real estate settled in strict settlement should be under 21, it is entirely void under the rule against perpetuities (*Marshall v Holloway* (1820) 2 Swan 432; and see *Martelli v Holloway* (1872) LR 5 HL 532; and PARAS 1120, 1124 ante), except where the trust is statutory. As to the statutory power to apply income for maintenance and to accumulate income during a minority see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 61-66. Cf para 1006 text and note 21 ante; and as to the possible operation of a direction to accumulate as an exclusion of a statutory power of maintenance see PARA 1126 note 2 ante.

7 For the meaning of 'disposition' see PARA 1009 note 1 ante.

8 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

9 See *ibid* s 13 (1) and PARA 1121 ante.

10 A disposition contained in a will is deemed to be made at the testator's death: see PARA 1018 note 1 ante. For the meaning of 'will' see PARA 1018 note 1 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(2) EXCEPTIONS FROM THE STATUTORY RESTRICTIONS/(i) Provisions for Payment of Debts or Incumbrances/1132. Exception in favour of provisions for paying debts.

(2) EXCEPTIONS FROM THE STATUTORY RESTRICTIONS

(i) Provisions for Payment of Debts or Incumbrances

1132. Exception in favour of provisions for paying debts.

Any provision for payment of the debts of any grantor, settlor, testator or other person is expressly excepted from the general statutory restrictions¹ on accumulations². The provision must be bona fide for the payment of debts³ but the provision is none the less bona fide because it provides for other matters in addition to the payment of debts⁴.

The debts may be either existing debts, or contingent liabilities to arise in the future⁵, and it seems that they may be debts of a stranger⁶; but the debt must be in existence as a legal liability, albeit contingent, when the instrument providing for accumulation takes effect⁷. The debts must, however, not be mere charges on the interest of a person under a trust for accumulation⁸. The exception has been applied to mortgages, either existing at the testator's death or made pursuant to his will, of an amount ascertained or to be ascertained in the execution of valid trusts⁹.

1 See the Law of Property Act 1925 s 164 (1) and PARA 1121 ante.

2 Ibid s 164 (2) (i), reproducing, with amendments, part of the Accumulations Act 1800 s 2 (repealed); and see *Bacon v Proctor* (1822) Turn & R 31; *Bateman v Hotchkin* (1847) 10 Beav 426. Accordingly such provisions may be made as if no statutory restrictions on accumulation of income had been imposed: Law of Property Act 1925 s 164 (2). As to the exemption of provisions for raising debts and incumbrances from the rule against perpetuities see PARA 1053 ante.

3 *Mathews v Keble* (1868) 3 Ch App 691 at 697, following *Varlo v Faden* (1859) 27 Beav 255 (affd 1 De GF & J 211).

4 *Re Hurlbatt, Hurlbatt v Hurlbatt* [1910] 2 Ch 553 at 559; but see *St Aubyn v St Aubyn* (1861) 30 LJ Ch 917 at 922 per Kindersley V-C. After the debts are paid, the accumulation is confined to the statutory period: *Colquhoun v Colquhoun's Trustees* (1892) 19 R (Ct of Sess) 946. The analogy used by Harman LJ in *Re Earl of Berkeley, Inglis v Countess Berkeley* [1968] Ch 744 at 772-774, [1968] 3 All ER 364 at 377-379, CA is apposite for these purposes.

5 *Varlo v Faden* (1859) 1 De GF & J 211 at 224, explaining dicta of Lord St Leonards LC in *Viscount Barrington v Liddell* (1852) 2 De GM & G 480 at 498; *Re Mason, Mason v Mason* [1891] 3 Ch 467; *Re Hurlbatt, Hurlbatt v Hurlbatt* [1910] 2 Ch 553. In *Re Cox, Cox v Edwards* [1900] WN 89, Byrne J held a provision for a reserve fund against future losses in the testator's business void beyond the 21 years, there being no direction in the will for payment of debts; and see *Re Rochford's Settlement Trusts, Rochford v Rochford* [1965] Ch 111 at 127, 128, [1964] 2 All ER 177 at 185, 186, comparing *Varlo v Faden* supra and *Re Hurlbatt, Hurlbatt v Hurlbatt* supra, where a provision to facilitate the discharge of a future liability to estate duty was held not to be within the exception of the Law of Property Act 1925 s 164 (2) (i).

6 *Viscount Barrington v Liddell* (1852) 2 De GM & G 480 at 497, 498 per Lord St Leonards LC; and see *Re Rochford's Settlement Trusts, Rochford v Rochford* [1965] Ch 111 at 125, [1964] 2 All ER 177 at 184. As to the exception under the rule against perpetuities see PARA 1053 ante.

7 *Re Rochford's Settlement Trusts, Rochford v Rochford* [1965] Ch 111 at 127, [1964] 2 All ER 177 at 185.

8 *Mathews v Keble* (1868) 3 Ch App 691.

9 *Bateman v Hotchkin* (1847) 10 Beav 426 at 433; *Bacon v Proctor* (1822) Turn & R 31; but see *Smyth's Trustees v Kinloch* (1880) 7 R (Ct of Sess) 1176 at 1185 per Lord Ormidale. In *Re Baroness Llanover, Herbert v Ram* [1907] 1 Ch 635 a mortgage by the trustees of a will for the purpose of raising estate duty was held to be an incumbrance within an accumulation clause, but no question arose under the statutory provisions restricting accumulation. See also *Re Cresswell, Lineham v Cresswell* (1913) 57 Sol Jo 578, where the exception was held not to justify accumulations beyond the period of 21 years for the purpose of recouping capital applied in payment of debts (revsd on the construction of the will (1914) 58 Sol Jo 360, CA). As to accumulations for the reduction of the National Debt see PARA 1139 post. A direction to accumulate simply directed to making good capital losses is probably not within the exception: see *Re Rochford's Settlement Trusts, Rochford v Rochford* [1965] Ch 111 at 125, [1964] 2 All ER 177 at 183, 184.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(2) EXCEPTIONS FROM THE STATUTORY RESTRICTIONS/(i) Provisions for Payment of Debts or Incumbrances/1133. Recoupment of beneficiaries.

1133. Recoupment of beneficiaries.

Where creditors are paid otherwise than from the proceeds of the fund directed to be accumulated to pay debts, the trust for accumulation comes to an end, and any right expressly or impliedly given to the persons who, claiming under the instrument, are thus disappointed by the mode of payment, to have the accumulation continued to recoup them is not within the exception in favour of provisions for payment of debts¹, and is valid only for one of the statutory periods².

1 See PARA 1132 ante.

2 *Re Heathcote, Heathcote v Trench* [1904] 1 Ch 826; *Re Rochford's Settlement Trusts, Rochford v Rochford* [1965] Ch 111 at 128, [1964] 2 All ER 177 at 185, 186; and see *Re Earl of Stamford and Warrington, Payne v Grey* [1925] Ch 162 at 175 (on appeal [1925] Ch 589, CA) and PARA 1054 note 1 ante. As to the statutory periods see PARA 1121 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(2) EXCEPTIONS FROM THE STATUTORY RESTRICTIONS/(ii) Provisions for Raising Portions/1134. Portions.

(ii) Provisions for Raising Portions

1134. Portions.

The general statutory restrictions on accumulations¹ do not extend to any provision for raising portions for any child, children or remoter issue of any grantor, settlor or testator, or any child, children or remoter issue of a person taking any interest under any settlement² or other disposition³ directing the accumulations or to whom any interest is thereby limited⁴.

A portion for this purpose includes a sum of money secured to a child or class of children out of property springing from or settled on their parent⁵. In general it must be a part or share of the property of the family, and not the whole of such property⁶.

The portion need not, however, be created by the instrument directing accumulation⁷. Thus, the portions may be portions charged for younger children in a strict settlement contained either in the instrument directing the accumulation⁸ or in any other instrument⁹.

1 See the Law of Property Act 1925 s 164 (1) and, in relation to instruments to which the Perpetuities and Accumulations Act 1964 applies, s 13 (1): see PARA 1121 ante.

2 For the meaning of 'settlement' see PARA 1122 note 1 ante.

3 For the meaning of 'disposition' see PARA 1121 note 3 ante; and for its meaning in the Perpetuities and Accumulations Act 1964 see PARA 1009 note 1 ante. The Accumulations Act 1800 s 2 (repealed) (see note 4 infra) referred to any 'conveyance, settlement or devise'. The word 'devise' in s 2 was interpreted to mean disposition by will: *Viscount Barrington v Liddell* (1852) 2 De GM & G 480 at 500 per Lord St Leonards LC, revsg 10 Hare 429, where Turner V-C held that the interest must be taken in the devised property, the income of which was to be accumulated. See also *Bourne v Buckton* (1851) 2 Sim NS 91 at 101; *Morgan v Morgan* (1851) 4 De G & Sm 164 at 171, 174; *Re Stephens, Kilby v Betts* [1904] 1 Ch 322 at 327.

4 Law of Property Act 1925 s 164 (2) (ii), reproducing, with amendments, part of the Accumulations Act 1800 s 2 (repealed). Accordingly, such provisions may be made as if no statutory restrictions on accumulation of income had been imposed: Law of Property Act 1925 s 164 (2). Where the purposes include other objects, then, after the portions are raised, the accumulation is confined to the statutory period: *Re Phillips, Phillips v Levy* (1880) 49 LJ Ch 198.

5 *Beech v Lord St Vincent* (1850) 3 De G & Sm 678; *Jones v Maggs* (1852) 9 Hare 605 at 607 per Turner V-C; *Re Stephens, Kilby v Betts* [1904] 1 Ch 322 at 327 per Buckley J; *Colquhoun's Trustees v Colquhoun* 1907 SC 346 at 352 per Lord Stormonth Darling.

6 *Edwards v Tuck* (1853) 3 De GM & G 40 at 58 per Lord Cranworth LC.

7 *Halford v Stains* (1849) 16 Sim 488; *Bourne v Buckton* (1851) 2 Sim NS 91 at 96; *Viscount Barrington v Liddell* (1852) 2 De GM & G 480 at 498.

8 *Beech v Lord St Vincent* (1850) 3 De G & Sm 678.

9 *Viscount Barrington v Liddell* (1852) 2 De GM & G 480; *Middleton v Losh* (1852) 1 Sm & G 61 (additions to portions created by another instrument).

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(2) EXCEPTIONS FROM THE STATUTORY RESTRICTIONS/(ii) Provisions for Raising Portions/1135. Funds which may or may not be portions.

1135. Funds which may or may not be portions.

A pecuniary legacy or annuity directed to accumulate may or may not be a portion, according to the circumstances of the case¹. A provision for a portion is not constituted where the provision depends upon the trustees' discretion at a future date², or by a provision directing additions of income to capital merely for the purpose of making one gift of an aggregate fund³. In the latter case, in which the accumulation is simply to increase the amount of the fund, no provision for a portion is made where the fund is the whole estate of the settlor or testator⁴, or is a residuary estate or share of a residuary estate of a testator⁵, or is a specific or general legacy to named persons⁶. No provision for a portion is made where the accumulated fund is held on trust for the parent for life and after his death for his children, even if an eldest son is excluded, as is usual in provisions for portions under family settlements⁷; nor where the fund is set apart to provide annuities for the parents, and after their deaths is given to their children⁸; nor where the child has only a power of appointment over the fund⁹, or takes only the interest of the fund¹⁰.

The use of the word 'portion' in describing the children's interests is not conclusive¹¹.

1 In *Beech v Lord St Vincent* (1850) 3 De G & Sm 678; *Viscount Barrington v Liddell* (1852) 2 De GM & G 480 (explained in *Watt v Wood* (1862) 2 Drew & Sm 56 at 61); *Middleton v Losh* (1852) 1 Sm & G 61; *St Paul v Heath* (1865) 11 Jur NS 903; *Re Stephens, Kilby v Betts* [1904] 1 Ch 322; and *Colquhoun's Trustees v Colquhoun* 1907 SC 346, such an accumulated legacy was held to be a portion; and see *Burt v Sturt* (1853) as reported at 22 LJ Ch 1071 at 1074 per Page Wood V-C (cited in note 5 infra). In *Morgan v Morgan* (1851) 4 De G & Sm 164 at 174; *Jones v Maggs* (1852) 9 Hare 605 (purporting to follow *Eyre v Marsden* (1838) 2 Keen 564 and *Bourne v Buckton* (1851) 2 Sim NS 91, which were cases of residuary estates); *Drewett v Pollard* (1859) 27 Beav 196; *Watt v Wood* (1862) 2 Drew & Sm 56 at 61 (where the legacy was held on trust for the parent during her life, and after her death for her younger children, legacies were held not to be portions). In *Re Elliott, Public Trustee v Pinder* [1918] 2 Ch 150, Sargant J refused to follow *Middleton v Losh* (1852) 1 Sm & G 61. See also *Shaw v Rhodes* (1835) 1 My & Cr 135 at 159 (affd sub nom *Evans v Hellier* (1837) 5 Cl & Fin 114, HL); *Viscount Barrington v Liddell* supra at 504 per Lord St Leonards LC, commenting on dicta in *Shaw v Rhodes* (1835) 1 My & Cr 135.

2 *Re Bourne's Settlement Trusts, Bourne v Mackay* [1946] 1 All ER 411, CA.

3 *Eyre v Marsden* (1838) 2 Keen 564 at 573 per Lord Langdale MR, applied in *Bourne v Buckton* (1851) 2 Sim NS 91; *Re Clulow's Trust* (1859) 1 John & H 639 at 647.

4 *Wildes v Davies* (1853) 1 Sm & G 475; *Edwards v Tuck* (1853) 3 De GM & G 40 at 57, 58 per Lord Cranworth LC.

5 *Eyre v Marsden* (1838) 2 Keen 564, doubted, except so far as it could be supported on other grounds, in *Viscount Barrington v Liddell* (1852) 2 De GM & G 480 at 503 per Lord St Leonards LC; but see *Burt v Sturt* (1853) as reported at 22 LJ Ch 1071 at 1073 per Page Wood V-C; *Pride v Fooks* (1840) 2 Beav 430; *Bourne v Buckton* (1851) 2 Sim NS 91; *Edwards v Tuck* (1853) 3 De GM & G 40; *Mathews v Keble* (1868) 3 Ch App 691; *Moon's Trustees v Moon* (1899) 2 F (Ct of Sess) 201; *Mackay's Trustees v Mackay* 1909 SC 139; and see *Cain v Watson* [1910] VLR 256. If specific sums by way of portion are given out of accumulated residue, it may be a valid accumulation by way of provision of portions: *Burt v Sturt* supra at 1074, where the judge did not rely on the fact that the fund was a residuary estate, and therefore indefinite, which he thought was a shadowy distinction. Where real and personal estate are given as a mixed fund, and the realty after accumulation is given to a class of nephews and nieces, and the personalty to their parents and other persons, the rents of the realty cannot be separated so as to make them an independent fund for portions: *Re Walker, Walker v Walker* (1886) 54 LT 792.

6 *Morgan v Morgan* (1851) 4 De G & Sm 164.

7 *Watt v Wood* (1862) 2 Drew & Sm 56.

8 *Webb v Webb* (1840) 2 Beav 493; *Drewett v Pollard* (1859) 27 Beav 196; and see *Mathews v Keble* (1868) 3 Ch App 691; *Re Walker, Walker v Walker* (1886) 54 LT 792; *Re Elliott, Public Trustee v Pinder* [1918] 2 Ch 150, not following *Middleton v Losh* (1852) 1 Sm & G 61.

9 *Re Clulow's Trust* (1859) 1 John & H 639 at 646, 647.

10 *Mackay's Trustees v Mackay* 1909 SC 139 at 143.

11 *Halford v Stains* (1849) 16 Sim 488 (where Shadwell V-C found that, although the testator had used the word 'portion', he had put his own interpretation upon it, intending it to mean 'a share': see *Halford v Stains* supra at 496); *Bourne v Buckton* (1851) 2 Sim NS 91. Cf *Middleton v Losh* (1852) 1 Sm & G 61 at 71 (where the fact that the interest in question was described in the will of the testatrix as a 'portion' appears to have been taken into account in deciding as to its character).

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(2) EXCEPTIONS FROM THE STATUTORY RESTRICTIONS/(ii) Provisions for Raising Portions/1136. Interests of children and issue.

1136. Interests of children and issue.

The children and issue¹ for whom such a provision² by means of accumulation may be made include children born after the date of the instrument or the testator's death, and are not restricted merely to those then living³. They apparently do not include any illegitimate children⁴, or persons to whom the testator stands merely in loco parentis⁵, and the exception is not complied with if the provision is for those children only who survive their parents⁶ or survive any other class of persons⁷.

The benefit is nonetheless a portion if it is given to all the children including the eldest child, and not to younger children only⁸. The fact that younger children only are provided for does not, however, make the benefit a portion unless it is a portion in other respects⁹.

1 The persons for whom portions may be raised include the children or remoter issue of the settlor or testator or of a person taking an interest under the disposition: see the Law of Property Act 1925 s 164 (2) (ii) and PARA 1134 ante. Formerly the persons for whom portions might be raised were confined to the children of the settlor or devisor or such a person (Accumulations Act 1800 s 2 (repealed)), and a provision for grandchildren of a testator, where some only of their parents took interests under the will, did not come within the exception in favour of portions (*Eyre v Marsden* (1838) 2 Keen 564 at 573).

2 I.e. a provision for raising portions: see PARA 1134 ante.

3 *Beech v Lord St Vincent* (1850) 3 De G & Sm 678. If in the events which happen there is a failure of the children for whom provision is made, the accumulation is void after the appropriate statutory period: *Edwards v Tuck* (1853) 3 De GM & G 40 at 72; *Re Clulow's Trust* (1859) 1 John & H 639.

4 *Shaw v Rhodes* (1835) 1 My & Cr 135 at 159 per Bosanquet J, who, assuming that two of the class were illegitimate, held that the provision, if for portions, would be void as to all. The observation, however, was an obiter dictum, as the alleged illegitimacy in the case appears not to have existed; see the appeal in that case sub nom *Evans v Hellier* (1837) 5 Cl & Fin 114 at 125, HL; and see Morris and Leach's Rule against Perpetuities (2nd Edn) 284 text and note 78. It seems at least arguable, however, that the Accumulations Act 1800 (repealed) was not intended to affect the nature of accumulations which could be directed but merely their duration (see Hargraves' Thellusson Act 41 para 23) and that the use of the word 'children' in the Act is, therefore, not confined to legitimate children. In a sense the Act was a disabling rather than an enabling statute and as such is to be construed strictly and, where a doubt or ambiguity exists, in favour of the common law right to accumulate from which it derogates: see Mathews' Law of Portions for Children 13; Lewis on Perpetuities 593; Hargraves' Thellusson Act 40, 41, 203; Randell on Perpetuity and on Trusts for Accumulation 212, 213. Cf *Union Bank of Scotland Ltd v Campbell* 1929 SC 143 at 153, 154.

The use of the phrase 'any child or children' in the Accumulations Act 1800 may prove significant in resolving the point in favour of named illegitimate children.

In the Family Reform Act 1987 and enactments passed and instruments made on or after 4 April 1988, references (however expressed) to any relationship between two persons are to be construed, unless the contrary intention appears, without regard to whether or not the father and mother or either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time: s 1. The Lord Chancellor may by order make provision for the construction in accordance with s 1 of such enactments passed before 4 April 1988 as may be specified in the order: s 30 (1). At the date at which this volume states the law no such order had been made.

5 See *Webb v Webb* (1840) 2 Beav 493; and see *Shaw v Rhodes* (1835) 1 My & Cr 135 at 150, where the point was raised in argument that the testator had placed himself in loco parentis to the persons for whom he was providing; affd sub nom *Evans v Hellier* (1837) 5 Cl & Fin 114, HL; but see *Colquhoun's Trustees v Colquhoun* 1907 SC 346 at 353. As to the extension of the exception in favour of portions so as to include provisions for issue remoter than children see note 1 supra.

6 *Drewett v Pollard* (1859) 27 Beav 196.

7 *Burt v Sturt* (1853) 10 Hare 415; and as to a gift over on death without issue before division see *Moon's Trustees v Moon* (1899) 2 F (Ct of Sess) 201 at 214 per Lord Moncrieff.

8 *Re Stephens, Kilby v Betts* [1904] 1 Ch 322 at 327 per Buckley J.

9 *Watt v Wood* (1862) 2 Drew & Sm 56 (where the accumulated fund was settled on the parent and younger children in succession). In *Beech v Lord St Vincent* (1850) 3 De G & Sm 678 an annuity charged upon the income given to the parent for his younger children was held to be a portion.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(2) EXCEPTIONS FROM THE STATUTORY RESTRICTIONS/(ii) Provisions for Raising Portions/1137. Parents' interest.

1137. Parents' interest.

The interest which must be taken by a parent, in order to make a provision for his children or issue a portion under the exception in favour of provisions for portions¹, may be any interest, however small, taken under the instrument in any property, not necessarily in that the income of which is to be accumulated².

¹ See PARA 1134 ante.

² *Viscount Barrington v Liddell* (1852) 2 De GM & G 480; *Re Stephens, Kilby v Betts* [1904] 1 Ch 322 (where the parent was tenant for life of the residuary estate); cf *Evans v Hellier* (1837) 5 Cl & Fin 114 at 126, 127 HL. In *Morgan v Morgan* (1851) 4 De G & Sm 164 at 174, the parent was a specific legatee, and the provision was held not to be a provision for portions. In *Jones v Maggs* (1852) 9 Hare 605 at 607, Turner V-C said that, although there might be cases in which provisions for children out of property in which the parents took no interest might be called portions, such provisions would receive that designation only where the nature or context of the instrument gave them that character.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(2) EXCEPTIONS FROM THE STATUTORY RESTRICTIONS/(iii) Other Statutory Exceptions/1138. Timber or wood.

(iii) Other Statutory Exceptions

1138. Timber or wood.

The general statutory restrictions on accumulations¹ do not extend to any provision respecting the accumulation of the produce of timber or wood²; and accordingly such a provision may be made as if no such restrictions had been imposed³.

1 See the Law of Property Act 1925 s 164 (1) and, in relation to instruments to which the Perpetuities and Accumulations Act 1964 applies, s 13 (1): see PARA 1121 ante.

2 Law of Property Act 1925 s 164 (2) (iii), reproducing with amendments part of the Accumulations Act 1800 s 2 (repealed). Such a direction may, however, be void under the rule against perpetuities: *Ferrand v Wilson* (1845) 4 Hare 344; and see PARA 1051 text and note 5 ante. As to the grounds of this exception see Hargrave's Thellusson Act 206, 207.

3 Law of Property Act 1925 s 164 (2).

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(2) EXCEPTIONS FROM THE STATUTORY RESTRICTIONS/(iii) Other Statutory Exceptions/1139. Validation of accumulations for reduction of the National Debt.

1139. Validation of accumulations for reduction of the National Debt.

Directions for the income of any trust property to be accumulated for any period and for the property and accumulations to be applied in reduction of the National Debt are valid, unless disclaimed by the Treasury, notwithstanding any Act or rule of law to the contrary¹.

1 See the Superannuation and other Trust Funds (Validation) Act 1927 s 9 and TRUSTS vol 48 (2007 Reissue) PARA 686. As to the exemption from income tax of the income from such accumulations see INCOME TAXATION vol 23(2) (Reissue) PARA 1224.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(2) EXCEPTIONS FROM THE STATUTORY RESTRICTIONS/(iii) Other Statutory Exceptions/1140. Accumulations held as capital money under the Settled Land Act 1925.

1140. Accumulations held as capital money under the Settled Land Act 1925.

The statutory provisions which restrict to a sole permitted period accumulations for the purchase of land¹ do not apply, nor did the statutory provisions which they replace² apply, to accumulations to be held as capital money for the purposes of the Settled Land Act 1925³ or the enactments replaced by that Act, whether or not the accumulations are primarily liable to be laid out in the purchase of land⁴.

1 I.e. the Law of Property Act 1925 s 166 (1): see PARA 1122 ante. As to the periods permissible apart from these provisions see PARA 1121 ante.

2 I.e. the Accumulations Act 1892 s 1 (repealed): see PARA 1122 ante.

3 As to powers in respect of capital money see SETTLEMENTS vol 42 (Reissue) PARA 795 et seq.

4 Law of Property Act 1925 s 166 (2). In effect s 166 (2) confirms the decision in *Re Danson, Bell v Danson* (1895) 11 TLR 455. Such accumulations will, however, be subject to the general restrictions imposed by the Law of Property Act 1925 s 164 (1) and, in relation to instruments to which the Perpetuities and Accumulations Act

1964 applies, by s 13 (1): see PARA 1121 ante. As to the effect of doctrines as to the conversion of estates and the payment of legacies on accumulations see PARA 1129 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(2) EXCEPTIONS FROM THE STATUTORY RESTRICTIONS/(iv) Cases in which Restrictions have been held Inapplicable/1141. Accumulation required by law.

(iv) Cases in which Restrictions have been held Inapplicable

1141. Accumulation required by law.

In general, accumulation required by law does not cause any suspension of the enjoyment of the property and is not affected by the statutory restrictions on accumulations¹. Where property is immediately given on trusts for any purpose to which no immediate application of the property is possible, there is a duty on the trustees, implied by law, to accumulate the income in the interval; and accordingly an express direction for such accumulation is valid, but is mere surplusage². Prior to 1 January 1926, it was clear that the vesting of property in a minor at the end of a valid period of accumulation might result in a further accumulation taking place during minority³. It is now provided by statute that accumulations of surplus income made during a minority are not to be taken into account in determining the statutory periods permitted for accumulations⁴.

Where surplus income of a trust is retained by trustees of a will in fulfilment of their obligations to protect an annuitant by securing the payment of an annuity constituting under the will a continuing charge on the income of the trust fund, such retention after the expiration of the statutory period does not contravene the statutory restrictions on accumulations, for it is not an accumulation of income for a period within those provisions⁵.

1 *Bryan v Collins* (1852) 16 Beav 14 at 17 per Romilly MR. As to the statutory restrictions see PARAS 1121, 1122 ante.

2 *Lombe v Stoughton* (1841) 12 Sim 304.

3 *Griffiths v Vere* (1803) 9 Ves 127 at 136 per Lord Eldon LC, explained in *Tench v Cheese* (1855) 6 De GM & G 453 at 463, and *Mathews v Keble* (1868) 3 Ch App 691 at 696, as a matter merely of the management of the minor's property by the court; and see *Bryan v Collins* (1852) 16 Beav 14 at 17, 18 (where it is pointed out that in such a case the accumulations might, if necessary, be applied for the minor's maintenance and advancement).

4 See PARA 1123 ante.

5 See *Re Earl of Berkeley, Inglis v Countess Berkeley* [1968] Ch 744, [1968] 3 All ER 364, CA.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(2) EXCEPTIONS FROM THE STATUTORY RESTRICTIONS/(iv) Cases in which Restrictions have been held Inapplicable/1142. Trusts for keeping up value of property.

1142. Trusts for keeping up value of property.

Any trust or direction which simply keeps the property up to its present value is not subject to the statutory restrictions on accumulations¹. Trusts² to effect out of income improvements coming generally under the heading of maintaining houses and tenements in good habitable

repair³, or to keep up a policy for the replacement, at the end of the term for which leaseholds are held, of the capital lost by not selling them⁴, or, it appears, to accumulate part of the rents as a sinking fund for the same purpose and as an indemnity fund⁵, are not, therefore, restricted within the statutory periods permitted for accumulations⁶, although a trust for the purpose of building houses on building land would be within the general restrictions⁷ imposed by statute⁸.

1 *Re Gardiner, Gardiner v Smith* [1901] 1 Ch 697 at 699, 701; and see *Re Rochford's Settlement Trusts, Rochford v Rochford* [1965] Ch 111 at 124, [1964] 2 All ER 177 at 183. See also *Re Rochford's Settlement Trusts, Rochford v Rochford* supra at 125 and at 184, where Cross J said that a provision simply directed to making good capital losses was not outside the statutory restrictions. As to the statutory restrictions see PARAS 1121, 1122 ante.

2 In *Bassil v Lister* (1851) 9 Hare 177 at 184 (cited in *Re AEG Unit Trust (Managers) Ltd's Deed, Midland Bank Executor and Trustee Co Ltd v AEG Unit Trust (Managers) Ltd* [1957] Ch 415 at 421, [1957] 2 All ER 506 at 509), Turner V-C suggested the following additional examples: a partnership agreement for a long term where part of the profits is to accumulate; insurance policies on the lives of debtors; a settlement of policies with stock transferred in trust to pay premiums out of the dividends.

3 *Vine v Raleigh* [1891] 2 Ch 13 at 26, CA per Lindley LJ, cited with approval in *Re Earl of Berkeley, Inglis v Countess Berkeley* [1968] Ch 744 at 772-774, [1968] 3 All ER 364 at 378, 379, CA. In *Curtis v Lukin* (1842) 5 Beav 147, such a trust was held to be invalid under the rule against perpetuities.

4 *Re Gardiner, Gardiner v Smith* [1901] 1 Ch 697, distinguished in *Re Rochford's Settlement Trusts, Rochford v Rochford* [1965] Ch 111, [1964] 2 All ER 177 (estate duty directed to be borne by income).

5 *Re Hurlbatt, Hurlbatt v Hurlbatt* [1910] 2 Ch 553, where, however, the trust, being primarily a trust for indemnity against liabilities, was supported: see PARA 1132 ante.

6 In *Re Rochford's Settlement Trusts, Rochford v Rochford* [1965] Ch 111 at 124, [1964] 2 All ER 177 at 183, Cross J said that it was established by the authorities that a provision for accumulating income which goes no further than a prudent owner would go in the management of the property in question is not within the Law of Property Act 1925 s 164.

7 *Vine v Raleigh* [1891] 2 Ch 13 at 26, CA per Lindley LJ.

8 See the Law of Property Act 1925 s 164 (1) and, in relation to instruments to which the Perpetuities and Accumulations Act 1964 applies, s 13 (1): see PARA 1121 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(2) EXCEPTIONS FROM THE STATUTORY RESTRICTIONS/(iv) Cases in which Restrictions have been held Inapplicable/1143. Trusts including other purposes.

1143. Trusts including other purposes.

A trust which includes the keeping up of the property to its present value, besides other purposes which fall within the statutory restrictions on accumulations, is valid, even if unrestricted in time, in so far as it is a bona fide provision for the first-mentioned object, and, when that is fulfilled, it will be subject to the statutory restrictions¹.

Where, in a due course of execution of the trusts, accumulation will not be sanctioned by the court, it will give effect to the rights of the persons entitled to the income² so far as it is not validly directed to be accumulated³. It appears that the court, while upholding such a trust, will not authorise the application of income to purposes the expenses of which ought to be defrayed out of capital⁴.

1 *Re Mason, Mason v Mason* [1891] 3 Ch 467 (where inquiries were ordered to ascertain the necessary expenditure). *Re Mason, Mason v Mason* supra was cited with approval in *Re Earl of Berkeley, Inglis v Countess*

Berkeley [1968] Ch 744 at 774, [1968] 3 All ER 364 at 379, CA. As to the statutory restrictions see PARAS 1121, 1122 ante.

2 See the Law of Property Act 1925 s 164 (1) and PARA 1146 post.

3 *Re Mason, Mason v Mason* [1891] 3 Ch 467 at 472, 473 per Stirling J.

4 *Vine v Raleigh* [1891] 2 Ch 13, CA; cf *Re Rochford's Settlement Trusts, Rochford v Rochford* [1965] Ch 111, [1964] 2 All ER 177.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(2) EXCEPTIONS FROM THE STATUTORY RESTRICTIONS/(iv) Cases in which Restrictions have been held Inapplicable/1144. Savings out of income and insurance policies.

1144. Savings out of income and insurance policies.

The statutory restrictions on accumulations¹ do not prevent trustees or anyone else from making savings out of income. In the case of trustees, the check is provided by the duty of conforming to the trust².

An insurance takes effect as a contract only; and a direction to effect or keep up a policy effected by the testator or the trustees is not affected by the statutory restrictions³, being outside the mischief at which the statute was aimed.

1 As to these restrictions see PARAS 1121, 1122 ante.

2 *Lindsay's Trustees* 1911 SC 584, distinguished in *Mclver's Trustees v Lord Advocate* 1973 SC 189. See also *Tench v Cheese* (1855) 6 De GM & G 453 at 463 per Lord Cranworth LC.

3 *Bassil v Lister* (1851) 9 Hare 177 at 184 (cited in *Re AEG Unit Trust (Managers) Ltd's Deed, Midland Bank Executor and Trustee Co Ltd v AEG Unit Trust (Managers) Ltd* [1957] Ch 415 at 421, [1957] 2 All ER 506 at 509); *Re Vaughan, Halford v Close* [1883] WN 89; *Cathcart's Trustees v Heneage's Trustees* (1883) 10 R (Ct of Sess) 1205. Cf *Royal Bank of Scotland v Lord Advocate* 1977 SC 116 (where the sole asset of a settlement was a policy on the settlor's life and a direction to accumulate any income arising under the policy was implied).

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(2) EXCEPTIONS FROM THE STATUTORY RESTRICTIONS/(iv) Cases in which Restrictions have been held Inapplicable/1145. Unit trust schemes.

1145. Unit trust schemes.

The general statutory restrictions on accumulation¹ have been held inapplicable to accumulations directed in a deed creating a unit trust scheme².

1 See the Law of Property Act 1925 s 164 (1) and, in relation to instruments to which the Perpetuities and Accumulations Act 1964 applies, s 13 (1): see PARA 1121 ante.

2 The statutory restrictions were held inapplicable because (1) the terms of the Law of Property Act 1925 s 164 were not apt in relation to such a deed; (2) the deed was not within the mischief which s 164 was designed to prevent; and (3) the accumulations could be terminated by the certificate holders under the scheme (see PARA 1120 ante): *Re AEG Unit Trust (Managers) Ltd's Deed, Midland Bank Executor and Trustee Co Ltd v AEG Unit Trust (Managers) Ltd* [1957] Ch 415, [1957] 2 All ER 506.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(3) APPLICATION OF SURPLUS ACCUMULATIONS/1146. Income undisposed of.

(3) APPLICATION OF SURPLUS ACCUMULATIONS

1146. Income undisposed of.

Where there is a trust to accumulate the income or surplus income of a fund for a period exceeding that permitted by the statutory restrictions¹, the income accruing from the fund after the expiration of the permitted period devolves, with one exception, as if a gap had been left between the end of the valid period of accumulation and the commencement of the next interest².

The exception is that, where a primary gift of an interest is cut down or charged only by a trust for accumulation and that trust exceeds the appropriate statutory period, the trust for accumulation is rejected for the excess and the primary gift takes effect free from it³. Otherwise, the effect of the invalidity of a direction to accumulate is not to accelerate the interests of the persons who take subject to it⁴; but, during the excess of the directed period of accumulation over the appropriate statutory period, the income⁵ goes to such person or persons as would have been entitled to it if the excessive accumulation had not been directed⁶. Thus, if the income to be accumulated is derived from residue, it passes to the persons entitled on the footing of an intestacy⁷. If it is the income of a particular fund and there is a true residuary gift, it falls into residue and, where the residue is settled, then, as between capital and income, it falls into residue as income⁸, as also does any surplus income of accumulations made during the permitted period⁹.

1 As to these restrictions see PARAS 1121, 1122 ante.

2 *Green v Gascoyne* (1865) 4 De G & Sm 565 at 572; *Weatherall v Thornburg* (1878) 8 ChD 261 at 269, 271, 272, CA; cf *Re Travis*, *Frost v Grestorex* [1900] 2 Ch 541 at 546, CA; *Re Tong*, *Hilton v Bradbury* [1930] 2 Ch 400 at 404 (on appeal on other grounds [1931] 1 Ch 202, CA). See also *Wilson's Trustees v Glasgow Royal Infirmary* 1917 SC 527, distinguished in *Dowden's Trustees v Governors of Merchiston Castle School* 1965 SC 56 at 65, 66; *Re Jefferys*, *Finch v Martin* [1939] Ch 205, [1938] 4 All ER 120.

3 *Trickey v Trickey* (1832) 3 My & K 560 at 565; *Evans v Hellier* (1837) 5 Cl & Fin 114 at 127, HL (explained in *Re Clulow's Trust* (1859) 1 John & H 639 at 648); *Combe v Hughes* (1865) 11 Jur NS 194 (on appeal 11 Jur NS 380). See also *Ogilvie's Trustees v Dundee Kirk-Session* (1846) 8 Dunl (Ct of Sess) 1229; *Mackenzie v Mackenzie's Trustees* (1877) 4 R (Ct of Sess) 962; *Maxwell's Trustees v Maxwell* (1877) 5 R (Ct of Sess) 248 at 250; and see *Russell's Trustees v Russell* 1959 SC 148, approving the dictum of Lord Justice Clerk Moncrieff in *Maxwell's Trustees v Maxwell* supra; *Re Cababé*, *Cababé v Cababé* (1914) 59 Sol Jo 129. The position is the same if the income is disposed of subject to a trust for accumulation for an excessive period 'so long as the same can lawfully operate': *Westcar v Westcar* (1856) 21 Beav 328.

4 *Eyre v Marsden* (1838) 2 Keen 564 (affd (1839) 4 My & Cr 231); *Boughton v James* (1844) 1 Coll 26 (affd (1848) 1 HL Cas 406); *Nettleton v Stephenson* (1849) 13 Jur 618; *Green v Gascoyne* (1865) 11 Jur NS 145; *Re Parry*, *Powell v Parry* (1889) 60 LT 489. See also *Muirhead v Muirhead and Crellin* (1890) 15 App Cas 289 at 299, HL; *White v White's Trustees* 1916 53 SLR 353; cf *Colquhoun v Colquhoun's Trustees* (1892) 19 R (Ct of Sess) 946.

5 For the meaning of 'income' see PARA 1121 note 6 ante.

6 Law of Property Act 1925 s 164 (1), replacing, with amendments, the Accumulations Act 1800 s 1 (repealed). See also *Inne's Trustees v Bowen* 1920 SC 133; *Re Blake*, *Berry v Geen* [1937] Ch 325, [1937] 1 All ER 742, CA (affd [1938] AC 575, [1938] 2 All ER 362, HL); *Re Robb*, *Marshall v Marshall* [1953] Ch 459, [1953] 1 All ER 920 (revsd in part by *Re Earl of Berkeley*, *Inglis v Countess Berkeley* [1968] Ch 744, [1968] 3 All ER 364, CA); *Brotherton v IRC* [1978] 2 All ER 267, [1978] 1 WLR 610, CA.

7 See PARA 1149 post.

8 *Re Hawkins, White v White* [1916] 2 Ch 570; and see PARA 1149 post.

9 *Re Hawkins, White v White* [1916] 2 Ch 570 at 579, applied in *Re Benor* [1963] 2 OR 248, 39 DLR (2d) 122; cf *Morgan v Morgan* (1851), as reported in 20 LJ Ch 441.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(3) APPLICATION OF SURPLUS ACCUMULATIONS/1147. Accumulations undisposed of.

1147. Accumulations undisposed of.

Accumulations made during the permitted period, and not in fact applied for the purposes of the particular fund the income of which is directed to be accumulated, pass, when those purposes have been satisfied, under the residuary gift, if any, and, if so passing, must be treated as capital and not as income¹. Where, however, the purposes for which accumulation has been directed have failed, the trust to accumulate fails also².

1 *Re Garside, Wragg v Garside* [1919] 1 Ch 132 at 136, 137.

2 *Re Thornber, Crabtree v Thornber* [1936] Ch 570; affd [1937] Ch 29, [1936] 2 All ER 1594, CA.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(3) APPLICATION OF SURPLUS ACCUMULATIONS/1148. Settlements.

1148. Settlements.

If the invalid direction is contained in a settlement, the rents and income result to the settlor for the excess, or, if he is dead, form part of his estate¹.

1 *Re Lady Rosslyn's Trust* (1848) 16 Sim 391; *Re O'Hagan, O'Hagan v Lloyds Bank Ltd* [1932] WN 188. It seems that the excess is capital, and not income of the estate: see *Re Hey's Settlement Trusts, Hey v Nickell-Lean* [1945] Ch 294, [1945] 1 All ER 618, not following *Re O'Hagan, O'Hagan v Lloyds Bank Ltd* supra. See also *Union Bank of Scotland Ltd v Campbell* 1929 SC 143; *Re Payne, Westminster Bank Ltd v Payne* [1943] 2 All ER 675 at 677; *Re Guinness's Settlement, Guinness v S G Warburg (Executor and Trustee) Ltd* [1966] 2 All ER 497 at 504, 505, [1966] 1 WLR 1355 at 1363-1365 per Goff J (following *Re Hey's Settlement Trusts, Hey v Nickell-Lean* supra and not following *Re O'Hagan, O'Hagan v Lloyds Bank Ltd* supra). As to the distinction which existed before 1 January 1926 in respect of the devolution of income on an intestacy according as it was derived from real or personal estate cf para 1149 post.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(3) APPLICATION OF SURPLUS ACCUMULATIONS/1149. Wills.

1149. Wills.

If the invalid direction to accumulate is contained in a will, the income for the excess period devolves as on a lapse of an interest held for the void excess¹, and therefore, if not itself the income of a residuary estate, falls into residue, if any², and forms part of the income of that

residue³. If the direction is for accumulation of the residuary estate itself, or there is no residuary gift, the income for the excess period passes as on an intestacy⁴. Where the testator died after 31 December 1925, the income, whether derived from real property or personal property, will be distributed in accordance with the statutory rules of intestate succession⁵ which apply to all property as to which a person dies intestate⁶.

Where the testator died before 1 January 1926, such income, subject to the rights of the testator's personal representatives, devolves, in the case of income derived from real estate, to the heir⁷, or, in default of heirs, to the Crown⁸, and in the case of income derived from personal estate to the next of kin of the testator at his decease⁹, or, if none, to the Crown¹⁰. A mixed fund is apportionable¹¹.

1 As to lapse see WILLS vol 50 (2005 Reissue) PARA 450 et seq.

2 *Haley v Bannister* (1820) 4 Madd 275; *Crawley v Crawley* (1835) 7 Sim 427; *O'Neill v Lucas* (1838) 2 Keen 313; *Webb v Webb* (1840) 2 Beav 493; *Ellis v Maxwell* (1841) 3 Beav 587; *A-G v Poulden* (1844) 3 Hare 555; *Morgan v Morgan* (1851) 4 De G & Sm 164; *Bryan v Collins* (1852) 16 Beav 14 at 19; *Re Phillips, Phillips v Levy* (1880) 49 LJ Ch 198; *Re Parry, Powell v Parry* (1889) 60 LT 489; *Re Pope, Sharp v Marshall* [1901] 1 Ch 64; *Re Deloitte, Griffiths v Deloitte* [1926] Ch 56.

3 *Re Hawkins, White v White* [1916] 2 Ch 570 (following *Re Phillips, Phillips v Levy* (1880) 49 LJ Ch 198 and *Re Cababé, Cababé v Cababé* (1914) 59 Sol Jo 129, in preference to *Crawley v Crawley* (1835) 7 Sim 427; *O'Neill v Lucas* (1838) 2 Keen 313; and *Re Pope, Sharp v Marshall* [1901] 1 Ch 64). See, however, *Re Whitehead, Peacock v Lucas* [1894] 1 Ch 678; *Re Garside, Wrang v Garside* [1919] 1 Ch 132; and see *Morgan v Morgan* (1851) 4 De G & Sm 164; *Otterson v Gould* (1892) 11 NZLR 577 (NZ CA).

4 *Re Blake, Berry v Geen* [1938] AC 575, [1938] 2 All ER 362, HL; *Re Robb, Marshall v Marshall* [1953] Ch 459, [1953] 1 All ER 920, overruled in part by *Re Earl of Berkeley, Inglis v Countess Berkeley* [1968] Ch 744, [1968] 3 All ER 364, CA.

5 See the Administration of Estates Act 1925 ss 46-49 (as amended) and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 583 et seq.

6 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 583 et seq.

7 *Sewell v Denny* (1847) 10 Beav 315; *Nettleton v Stephenson* (1849) 3 De G & Sm 366; *Burt v Sturt* (1853) 10 Hare 415 at 428. See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 638 et seq.

8 *Weatherall v Thornburgh* (1878) 8 ChD 261, CA.

9 *M'Donald v Bryce* (1838) 2 Keen 276; *Eyre v Marsden* (1838) 2 Keen 564; *Pride v Fooks* (1840) 2 Beav 430; *Elborne v Goode* (1844) 14 Sim 165; *Wilson v Wilson* (1851) 1 Sim NS 288; *Matthews v Keble* (1868) 3 Ch App 691; *Elder's Trustees v Treasurer of Free Church of Scotland* (1892) 20 R (Ct of Sess) 2 (where the residuary legatee was not ascertainable). See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 637.

10 *Weatherall v Thornburgh* (1878) 8 ChD 261, CA. See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 637.

11 *Eyre v Marsden* (1838) 2 Keen 564; *Burt v Sturt* (1853) 10 Hare 415; *Ralph v Carrick* (1877) 5 ChD 984 at 998; *Re Walker, Walker v Walker* (1886) 54 LT 792; *Harrison v Harrison* (1904) 7 OLR 297; cf *Talbot v Jevers* (1875) LR 20 Eq 255.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(3) APPLICATION OF SURPLUS ACCUMULATIONS/1150. Position of heir of person dying before 1 January 1926.

1150. Position of heir of person dying before 1 January 1926.

In the case of persons who died before 1 January 1926, the heir is entitled to the income of real estate under the doctrine of reconversion, even though conversion has taken place¹, but he

does not become protector of the settlement for purposes of disentail as claiming under a resulting use or trust for the settlor². The heir or other person claiming by virtue of the period of accumulation exceeding the statutory period may, however, be a tenant for life for the purposes of the statutory provisions³ relating to settled land⁴.

Where accumulation is directed for the life of any person, the interest of the heir is a chattel interest which devolves on his personal representative⁵.

In the case of deaths which occurred before 1 January 1926, a trust to invest accumulations of personal estate in land does not give the invalid accumulations to the heir; they go to the next of kin⁶.

1 *Eyre v Marsden* (1838) 2 Keen 564; *Re Perkins, Brown v Perkins* (1909) 101 LT 345; *Re Walpole, Public Trustee v Canterbury* [1933] Ch 431; cf *Moon's Trustees v Moon* (1899) 2 F (Ct of Sess) 201. See also EQUITY vol 16(2) (Reissue) PARAS 710.

2 See the Fines and Recoveries Act 1833 ss 22, 27; *Re Hughes* [1906] 2 Ch 642; *Re Blandy Jenkins' Estate, Blandy Jenkins v Walker* [1917] 1 Ch 46 at 58; and REAL PROPERTY vol 39(2) (Reissue) PARA 124 et seq. In *Re Darnley's Will Trusts, Darnley v Bligh* [1970] 1 All ER 319, [1970] 1 WLR 405, Pennycuik J expressed doubts as to the correctness of *Re Blandy Jenkins' Estate, Blandy Jenkins v Walker* supra and followed it only with reluctance.

3 See the Settled Land Act 1925: see SETTLEMENTS.

4 *Vine v Raleigh* [1896] 1 Ch 37; *Re Atherton* [1891] WN 85; and see *Re Buttle's Will Trusts, Buttle v IRC* [1977] 3 All ER 1039, [1977] 1 WLR 1200, CA, distinguishing *Vine v Raleigh* supra; and SETTLEMENTS.

5 *Sewell v Denny* (1847) 10 Beav 315. See also *Barrett v Buck* (1848) 12 Jur 771 (where the proposition was admitted). In *Halford v Stains* (1849) 16 Sim 488, the interest undisposed of was held to go to the heir of the heir as 'part of the inheritance': see Gray's Rule against Perpetuities (4th Edn) s 702.

6 *Bourne v Buckton* (1851) 2 Sim NS 91, 101. See also *Vine v Raleigh* [1896] 1 Ch 37 at 38, 39.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(3) APPLICATION OF SURPLUS ACCUMULATIONS/1151. Charge under a power.

1151. Charge under a power.

Where accumulations are directed of a fund arising under the exercise of a power to charge, the invalid accumulations do not sink for the benefit of the estate charged in a case where the fund has been made part of the estate of the person exercising the power¹.

1 *Simmons v Pitt* (1873) 8 Ch App 978. Cf the position where property was devised subject to a charge for accumulations which infringed the Accumulations Act 1800 (repealed): see *Re Clulow's Trust* (1859) 1 John & H 639 at 649.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(3) APPLICATION OF SURPLUS ACCUMULATIONS/1152. Accumulations capable of being terminated.

1152. Accumulations capable of being terminated.

The claims of persons who would otherwise be entitled under the rules previously mentioned¹ may be ousted where the trust for accumulation is prevented from being invalid owing to the rights of some other person who has a vested interest to determine the trust². On the application of a person who has not the sole interest in the accumulations, the court will not, however, make an order determining a trust for accumulation where the effect of such an order may be to prejudice the interests of other persons in the released income without their consent³.

In relation to instruments to which the Perpetuities and Accumulations Act 1964 applies⁴, where in any proceedings a question arises as to the beneficiaries' right to put an end to accumulations of income under any disposition⁵ which turns upon a person's ability to have a child at some future time, certain presumptions may be made and evidence given as to future parenthood as previously mentioned⁶.

1 See PARAS 1146-1151 ante.

2 *Wharton v Masterman* [1895] AC 186, HL; *Re Swain, Monckton v Hands* [1905] 1 Ch 669, CA; and see *Oddie v Brown* (1859) 4 De G & J 179; *MacVean v MacVean* (1899) 24 VLR 835. In the case of an expressed wish that accumulations should be made for the benefit of charities, effect may be given to the testator's wishes by the provisions of the scheme: *Re Knapp, Spreckley v A-G* [1929] 1 Ch 341. As to the principle that an accumulation is not invalid if it can be terminated by beneficiaries see PARA 1120 ante. There is no interference with the statutory rights unless the trust for accumulations is thus determinable: *Talbot v Jevers* (1875) LR 20 Eq 255 at 260; *Weatherall v Thornburgh* (1878) 8 ChD 261, CA; *Re Parry, Powell v Parry* (1889) 60 LT 489; *Re Travis, Frost v Greatorex* [1900] 2 Ch 541, CA.

3 *Re Blake, Berry v Geen* [1938] AC 575, [1938] 2 All ER 362, HL.

4 As to instruments to which the Perpetuities and Accumulations Act 1964 applies see PARA 1009 note 2 ante.

5 For the meaning of 'disposition' see PARA 1009 note 1 ante.

6 See the Perpetuities and Accumulations Act 1964 ss 2, 14 and PARA 1066 ante.

Halsbury's Laws of England/PERPETUITIES AND ACCUMULATIONS (VOLUME 35 (REISSUE))/3. RESTRICTION OF ACCUMULATION/(3) APPLICATION OF SURPLUS ACCUMULATIONS/1153-1200. Costs.

1153-1200. Costs.

The costs of proceedings to determine the invalidity of a provision for accumulation in a will are subject to the discretion of the court¹, and generally are ordered to come out of the general estate, including the accumulations validly made, but not out of the accumulations invalidly made².

1 See the Supreme Court Act 1981 s 51 (substituted by the Courts and Legal Services Act 1990 s 4 (1)); RSC Ord 62 r 2 (4); and the Supreme Court Practice 1993 para 62/2/7-12.

2 *Eyre v Marsden* (1839) 4 My & Cr 231 (affg (1838) 2 Keen 564); *Barrett v Buck* (1848) 12 Jur 771; *Burt v Sturt* (1853) 10 Hare 415; *Re Clulow's Trust* (1859) 1 John & H 639; *Talbot v Jevers* (1875) LR 20 Eq 255; *Ralph v Carrick* (1877) 5 ChD 984 at 998. In *Elborne v Goode* (1844) 14 Sim 165 and *Green v Gascoyne* (1865) 4 De GJ & Sm 565 at 572, the costs were divided proportionately between a fund, part of the general residue, including the lawful accumulations, and a fund, the remainder of the residue, representing the accumulations made void by statute; and in *Nettleton v Stephenson* (1849) 18 LJ Ch 191, the costs were made payable out of the valid accumulations, and any deficiency was directed to be borne by the excess accumulations. Cf *Smith v Lomas* (1864) 33 LJ Ch 578. In *Bourne v Buckton* (1851) 2 Sim NS 91 and *Bryan v Collins* (1852) 16 Beav 14, the costs were paid out of the excess accumulations. As to costs payable out of a fund see RSC Ord 62 rr 3, 12, 14 and CIVIL PROCEDURE; and as to costs generally see CIVIL PROCEDURE vol 12 (2009) PARA 1729 et seq.

UPDATE

1153-1200 Costs

TEXT AND NOTES--RSC replaced by the Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

